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BBLK

A MANUAL

OF

The Law

OF

PRINCIPAL AND AGENT.

BY

EZEKIEL CHARLES PETGRAVE,

ATTORNEY AT LAW.

LONDON:

V. & R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers,

26, BELL YARD, LINCOLN'S INN.

1857.

24931/17

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P4429p
1857

LONDON:
PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

PREFACE.

It occurred to the Writer of the following pages, that a short treatise on the Law of Principal and Agent, somewhat more copious and comprehensive than the chapters devoted to that head in works of a general character, such as Addison on Contracts or Smith's Mercantile Law, but still not aspiring to the diffuseness of such a treatise as Mr. Justice Story's Commentaries on the Law of Agency, might be found useful by practitioners. No English work on the subject has appeared for some years, and since Mr. Story's treatise was published there have been numerous decisions in the English Courts on certain branches of the law of Agency.

In the following treatise the Writer has availed himself of the work of Mr. Justice Story to a great extent; but, as any one at all conversant with the

Reports will observe, he has added a very considerable number of cases, including the latest decisions in any way connected with the Law of Principal and Agent. He has studied brevity in those branches of the subject which are firmly settled, and on which there appears little likelihood of any questions being mooted.

The Author feels that some apology is due for one, in his branch of the profession, writing a treatise connected more with the theory than the practice of the law. The apology must be, that he wrote the work some years ago when he had considerable leisure time on his hands. He has recently, amidst numerous other engagements, made a few additions, and now presents the result of his labours for what it is worth.

BATH, *March*, 1857.

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THE LAW

OF

PRINCIPAL AND AGENT.

CHAPTER I.

OF THE RELATION OF PRINCIPAL AND AGENT.

SECT. I.

WHO MAY APPOINT AGENTS.

ANY person, who has a right to enter into a contract or to do any act in his own name and on his own account, may by the common law appoint an agent to enter into such contract or perform such act for him (*a*); and a person joined with others in partnership may appoint an agent to act for all in the conduct of any matter connected with the partnership business (*b*). There is, however, one exception to this general principle by statutory enactment, for a man, by the 21 Jac. c. 16 (Statute of

(*a*) *Coombe's case*, 9 Co. Rep. 75 b.

(*b*) Story, § 39. But one of a committee of shareholders appointed to carry on a periodical is not empowered to contract with any one for the supply of literary articles. *Heraud* v. *Leaf*, 17 L. J., C. P., 57.

Limitations), cannot appoint an agent to sign an instrument, so as to exclude a case from its operations. This enactment has not been adopted in the 3 & 4 Will. 4, c. 42, under which an agent lawfully authorized may, equally with his principal, prevent time from being a bar to a claim, by complying with the requisitions therein directed.

The enactment of the first section of the 9 Geo. 4, c. 14, is, that no acknowledgment or promise by words shall be deemed sufficient evidence of a new or continuing contract, unless such acknowledgment or promise shall be made in some writing *to be signed by the party chargeable thereby.* In consequence of these last words, it has been solemnly decided, that an acknowledgment signed by an agent on behalf of a debtor is not sufficient (*c*). It is doubtful whether, if the agent's authority were in writing, there would or would not be a sufficient connection between the two documents to satisfy the statute (*d*).

Persons not *sui juris*, married women, infants, idiots, lunatics, being generally incapable of contracting on their own account, cannot appoint agents.

Married women are ordinarily incapable of appointing an agent or attorney. But it would appear

(*c*) *Hyde* v. *Johnson*, 2 Bing. N. C. 780.
(*d*) Smith's L. Cases, vol. i. p. 322.

that where a married woman can do any act with the assent of her husband, she may, with his assent, appoint an agent to do the same act; and that she may also depute another to perform any act affecting her separate property, because in relation to such separate property she is generally treated as a *feme sole*. But the matter does not seem to be satisfactorily settled (*e*). A wife certainly cannot appoint an attorney to surrender her copyholds without a custom to that effect; and it seems doubtful whether she could do so even by virtue of a custom (*f*).

Infants may authorize a person to do any act which is for their benefit, but not to do any thing to their prejudice. Thus, an infant may give a letter of attorney to another to take a livery on a feoffment to him, but he cannot appoint a person to make a livery in his name, as a grant is taken most strongly against the grantor (*g*).

A person may have a right to contract or act for others, and yet be unable to appoint an agent to do so, or rather a substitute; he must be able to do all he requires in his own name and on his own account, otherwise he cannot appoint an agent (*h*).

(*e*) Story, § 6.
(*f*) Bright on Husband and Wife, vol. ii. p. 51; *Graham* v. *Jackson*, 6 Q. B. 811.
(*g*) *Zouch* v. *Parsons*, 3 Burr. 1808.
(*h*) *Coles* v. *Trecothick*, 9 Ves. jun. 251.

In short, one agent cannot, without committing a breach of faith, appoint another to do what he is himself directed to perform; for the authority, being a confidence in him personally, it cannot be assigned to a stranger, whose ability might not be known or trusted by the principal (*i*). Thus, an executor empowered to sell property must dispose of it himself, and is not permitted to transfer the power of doing so to another (*j*). A person with a power of distribution of property among certain persons must execute it personally (*k*). A factor, not being able to dispose of goods consigned to him for sale at the place for which they were destined, cannot commit them to another person for sale (*l*). A broker cannot depute to another the right to sign a contract on behalf of his employer (*m*). *Delegata potestas non potest delegari* (*n*).

But an agent may do by the hands of another what it is in the scope of his authority to do. As for instance, a parent, who is an agent, may direct a child to sign the parent's name on a bill of exchange (*o*). An agent may procure the assistance of others in the work assigned to him. Thus, a

(*i*) Story, § 13.
(*j*) *Coombe's case*, 9 Co. Rep. 75.
(*k*) *Ingram* v. *Ingram*, 2 Atk. 88.
(*l*) *Catlin* v. *Bell*, 4 Camp. 138.
(*m*) *Henderson* v. *Barnewall*, 1 Y. & Jerv. 387; *Cockran* v. *Irlam*, 2 M. & S. 301, n.
(*n*) 2 Inst. 597; see *Cockran* v. *Irlam*, 2 M. & S. 301, n.
(*o*) *Lord* v. *Hall*, 19 L. J., C. P., 46.

person was held to have committed no breach of duty in placing some goods entrusted to him in the warehouse of another person for safe custody (*p*). An agent may also depute any part of a duty which it is not in his province to perform, or where it is indispensable by law or usual in the course of trade that he should do so. Thus, if a person should order his goods to be sold by an agent at public auction, and the sale could only be made by a licensed auctioneer, the authority to substitute him in the agency, so far as the sale is concerned, would be implied (*q*). Of course, where it is understood by the parties that the particular business should be transacted, if necessary, by the hands of a substitute, the immediate agent may appoint another in his place (*r*). And, on the other hand, if in any of the exceptions to the general rule, that an agent cannot appoint another to execute the agency, it is inconsistent with the terms of the original appointment that another should take the place of the immediate agent, such substitution cannot take place; for it being the primary obligation of an agent to adhere to his instructions, it follows that he cannot do what would be

(*p*) *Goswell* v. *Dunkley*, 1 Str. 681.

(*q*) Story, § 14, citing an American case, *Laussatt* v. *Lippincott*, 6 Serjt. R. 386; see *Bromley* v. *Coxwell*, 1 Bos. & Pull. 438.

(*r*) *Coles* v. *Trecothick*, 9 Ves. jun. 234.

in contravention of them (*s*). The true doctrine, says Mr. Story, which is to be deduced from the decisions is, that the authority is exclusively personal, unless from the express language used, or from the fair presumptions growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent (*t*).

It remains to notice, that a corporation aggregate, being an artificial creation, *must* act through the instrumentality of an agent, who is appointed by the act of incorporation, or who is authorized under the common seal of the corporation to do the requisite act (*u*).

Sect. 2.

WHO MAY BE AGENTS.

Many persons who are incapable of appointing are nevertheless competent to become agents. Thus, persons *non sui juris*, as infants and *femes covertes*, from their inability to contract on their own account, are excluded from the class who may appoint agents, but may be agents for others, who will be bound by their acts. A married woman may execute any authority, for she is no more than

(*s*) *Boville* v. *Bradbury*, 2 Stark. N. P. C. 136.
(*t*) Story, § 14.
(*u*) Co. Litt. 66 b; Com. Dig. Attorney, c. 2.

the instrument of another person, so that a power may be executed by her even without the concurrence of her husband (*v*). The reason of this is obvious, for the persons themselves, for whose protection the incapacity to contract and by contracting to render themselves answerable has been established, can in no way be prejudiced by the execution of a bare authority (it has no operation upon any interests of their own); and third persons may have their remedy against the principal (*w*). But, of course, in their character of agents these incapacitated persons can neither sue or be sued for anything done by them any more than they could if they were acting merely on their own account. Although a husband and wife are deemed in law to be only one person, the wife may be attorney for her husband, and may sign instruments for him (*x*); she may act as the agent of another in a contract with her own husband (*y*); though doubts are entertained whether she can do so, if her husband expressly dissents from it (*z*). But idiots and lunatics, not having discretion to bestow on the affairs of others any more than their own,

(*v*) Bright on Husband and Wife, vol. ii. p. 54.
(*w*) *Emerson* v. *Bloxden*, 1 Esp. 142; *Wynne* v. *Wynne*, 4 Man. & Gr. 253.
(*x*) *Scarpellini* v. *Acheson*, 7 Q. B. 864; *Lindus* v. *Bradwell*, 12 Jur. 230.
(*y*) Co. Litt. 58 a.
(*z*) Story, § 7.

cannot as agents bind a principal (*a*). There are, however, certain cases in which persons otherwise fully qualified to act as agents are, by the principles of common law, founded, indeed, on the doctrines of the civil, forbidden to act as agents, or rather, if persons are agents they cannot fill a character adverse to their principal. Thus a person cannot, in a sale made by him as agent for his principal, himself purchase the goods, nor can he, as agent for a principal wishing to purchase, dispose of his *own* goods, inasmuch as the characters of buyer and seller cannot well be united in one person; for in the part they have to perform an opposition of interest exists, and a certain degree of circumvention is to be expected (*b*). Where a person employed to sell a reversionary legacy purchased it himself in another name, the transaction was set aside (*c*).

The same rule applies to any person holding a relation of confidence towards another, in which case he cannot contract with his principal in the same manner as if such relation did not exist. A memorandum signed by a vendor at the request of the purchaser will not bind the latter as a memo-

(*a*) Story, § 7.
(*b*) *Lowther* v. *Lowther*, 13 Ves. 103; *Massey* v. *Davies*, 2 Ves. 317.
(*c*) *Lowther* v. *Lowther*, 13 Ves. 103; *Fox* v. *Mackeath*, 1 Tu. & Wh. L. C. p. 66.

randum within the Statute of Frauds, on account of the incompatibility of character (*d*).

Sect. 3.

OF THE MODE OF APPOINTING AGENTS.

The question whether a man has been appointed agent for another does not often arise; for evidence, however slight, will establish an agency of some kind, though perhaps a very limited one. The chief difficulty generally presents itself in determining, as between the principal and agent, what the duty of the latter is; and, as between the principal and agent and third persons, what the extent of the authority is which he derives from his principal, and in what manner third persons are affected thereby as to their right of suing or being sued on contracts derived from the authority.

For certain purposes the appointment of an agent must be by deed. Thus, an agent required to execute a deed must be appointed by an instrument of equal solemnity; and a mere unsealed instrument will not be considered valid in law to authorize any act of agency required to be done in the name of the principal under seal; though a Court of Equity might interfere to compel the principal to

(*d*) Story, § 9; *Wright* v. *Dannah*, 2 Camp. 203.

give validity to the deed by his personal execution of it (*e*). Although the principal may acknowledge that he gave his agent authority, the production of the authority under seal will be required (*f*). But if the principal is himself present at the signing and sealing of his agent, although the appointment of the latter is not under seal, if he himself authorizes the agent to execute the deed, it becomes the deed of the principal, and binding upon him (*g*).

An agent to do any valid act, so as to bind a corporation aggregate, must be appointed by deed under their common seal, except for trifling agencies for inferior purposes, as a common servant, &c. (*h*). Where a corporation has done any wrongful act, they may make restitution without this formality. "If a corporation have helped themselves to another man's money, it would be absurd to say that they must bind themselves under seal to return it" (*i*). Where, by the act of incorporation, the directors of a railway company were empowered to appoint and displace the officers of the

(*e*) *Harrison* v. *Jackson*, 7 T. R. 209; *Hunter* v. *Parker*, 7 M. & W. 322.

(*f*) *Steiglitz* v. *Egginton*, 1 Holt's N. P. C. 141.

(*g*) *Ball* v. *Dunsterville*, 4 T. R. 313.

(*h*) *Dunstan* v. *Imperial Gas Light Company*, 3 B. & A. 125; *Chilton* v. *London and Croydon Railway Company*, 16 Mec. & W. 212.

(*i*) *Hall* v. *Mayor of Swansea*, 2 Q. B. 547.

company, it was held, that the appointment of an attorney need not be under seal (*j*).

For the purposes described in the 1st, 2nd and 3rd sections of the Statute of Frauds, that is, for making or creating a freehold or any uncertain interest in lands, tenements or hereditaments, other than leases for a less term than three years in messuages, manors, lands, tenements or hereditaments, or for surrendering the same (except copyhold interests), the authority of the agent must be in writing. But for the purposes described in the 4th section, viz., to charge any executors or administrators out of their own estates; or to charge any for the debt or default of another upon any agreement in consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement not to be performed within a year, though the several agreements recited must be in writing, signed by the party or his agent thereunto by him lawfully authorized, the *authority* is not required to be in writing. And, therefore, the authority to contract for a lease or other interest in land need not be in writing, though the authority to sign the lease or instrument by which the interest passes must be so. Neither does the

(*j*) *R.* v. *Justices of Cumberland*, 5 Ol. B. & Lef. Railw. & Canal Cases, 332.

17th section, relating to the sale of goods above 10*l.*, which requires a note or memorandum in writing, signed by the parties to be charged, or their agents thereunto lawfully authorized, make it necessary that the authority should be in writing (*k*). An agent may by a verbal or even an implied authority be appointed to sign or indorse a bill of exchange in another person's name (*l*).

The most usual instrument which formally conveys authority is a power of attorney; but anything, as a letter of instructions, a memorandum, a verbal request, or acquiescence, which signifies an intention on the part of the principal that the agent shall perform certain acts for him, will be construed by the Courts as an appointment to do those acts, and will as effectually bind either of the parties concerned as the most precise and formal declaration, that the employed is appointed agent for the particular purposes, can do (*m*).

Among mercantile men the most usual mode of appointing an agent is by a letter of instructions or a written request, where the employer and the employed do not reside in the same place. But where there are opportunities of personal intercourse, a verbal request is most common. Even

(*k*) Paley on Principal and Agent, p. 158.
(*l*) 12 Mod. 564.
(*m*) *Whitehead* v. *Tuckett*, 15 East, 408; *Dyas* v. *Cruise*, 2 Jones & Latouche, 460.

the recognition of an agent's acts may be said to be a valid appointment, for the result is the same as if the agent had been authorized by direct communication. Thus a clerk or shopman who sells goods or indorses notes, by the acquiescence of his master in his acts on former occasions, may be appointed agent to continue acts of a similar nature, and his authority to do these acts will be implied from the principal's recognition (*n*).

(*n*) Story, § 55.

(1.) In the affairs of a foreign merchant a power of attorney is frequently the proper evidence of authority, as it empowers the factor to represent the principal, and to act as he could have done, if present.

(2.) But agents, factors or brokers are generally appointed in mercantile affairs by letter. So, a confidential clerk is authorized to indorse bills by letter; so goods are consigned from abroad with directions to the consignee to sell them, or one is desired to buy goods in the common course of correspondence.

(3.) But in the course of mercantile dealings goods are placed with general agents or sent to public warehouses, and the power of disposal entrusted to brokers, and this kind of agency is constituted without any writing of any kind.

(4.) Mercantile agents have authority frequently conferred upon them by mere implication, as where a clerk or other agent indorses bills for his master and he pays them. 1 Bell, Com., art. 410, p. 386.

In some works on agency, the appointment of an agent and the giving him authority are treated as different things. If there is a difference it is only verbal, for what can be the practical distinction between a person saying, "I appoint you my agent to do this," and "I authorize you as my agent to do this." The conduct and duty of the agent is in each case the same; and, as far as third persons are concerned, their rights and liabilities are exactly the same.

Sect. 4.

DIFFERENT KINDS OF AGENTS.

There are, as it may be supposed, as many different kinds of agents as there are of transactions in which they may be employed or acts they are appointed to perform.

Of the whole body of agents a division may be made, in respect of their *duties* to their employers, into *professional* and *unprofessional, remunerated* and *unremunerated;* in respect of their *authority* to bind their principal, into *general* and *particular*, or, as it is sometimes called, *special.* In respect of the nature of their calling they are either *mercantile* or *non-mercantile;* and of these, of course, as said above, a subdivision may be made into an infinite variety of cases, according to the nature of their employment. It may, perhaps, be as well to notice some of those, which have acquired a distinctive appellation, for very erroneous inferences may be drawn by applying to one class of agents principles which only have reference to another.

The different kinds of agents most commonly recognized under their respective names in commercial agency are Auctioneers, Brokers, Factors, Consignees, Super-cargoes, Ships' Husbands, Masters of Ships, Partners and Sharebrokers. But "there are a vast variety of forms, in which

the authority of principals are duly delegated to others (*o*)."

An *auctioneer* is a person authorized to sell property of any kind at a public sale for a commission. An auctioneer, as such, does not sell at a private sale. He is, primarily, deemed the agent of the seller; but, after the sale has been completed, he may become the agent of the purchaser; and it will be presumed that he has an authority from the purchaser to write down his name as buyer, after knocking down the goods to him, and such memorandum will be deemed a sufficient signing of an agent of both parties within the Statute of Frauds (*p*).

Brokers are persons employed in mercantile affairs in making contracts relative to the disposal of goods or valuables of any kind; and one class of brokers, insurance brokers, in procuring insurance and settling losses, or in procuring freight or charter-parties (*q*). All persons are brokers who contrive, make, and conclude bargains and contracts between merchants and tradesmen, for which they have a fee or reward; and he is not a broker who is employed relative to the hiring of other persons (*r*). In return for their services all brokers

(*o*) Story, § 26.
(*p*) *Williams* v. *Millington*, 1 H. Bl. 81; *Fairbrother* v. *Simmons*, 5 B. & Ald. 333.
(*q*) Story, § 32.
(*r*) *Mitford* v. *Hughes*, 16 L. J., Exch., 40.

are entitled to a compensation called brokerage. A broker never acts or deals in his own name, but in the names of those who employ him, and is not entrusted with the possession of the goods he is employed to buy or sell (*s*). "A broker has only a special authority, not a general one; and 'if you employ a broker to buy one kind of goods, and he buys another, you are not bound by his act (*t*).'" It would be a fraud on the part of a broker were he to act for both parties, without disclosing to each of the principals that he was doing so (*u*). After the contract is entered into, but not before, he will be looked upon as the agent of both parties, so as to be enabled to bind them by the signing of a contract within the Statute of Frauds (*v*). On a sale a broker usually gives to the buyer a note called a sold note, and to the seller one called a bought note, each in his own name as the agent of each; and the buyer and seller are thereby respectively bound, and the bought and sold notes constitute the contract (*x*). The bought and sold notes

(*s*) *Baring* v. *Corrie*, 2 B. & Ald. 137.

(*t*) *Potts* v. *Beckett*, 13 M. & W. 747; *Henderson* v. *Barnewall*, 1 Y. & Jerv. 687. By the 6 Anne, c. 16, brokers are required, in the city of London, to be licensed by the mayor and aldermen before they can lawfully carry on business. *Cope* v. *Rowlands*, 2 M. & W. 149.

(*u*) Story, §§ 28, 31.

(*v*) *Hinde* v. *Whitehouse*, 7 East, 569; *Henderson* v. *Barnewall*, 1 Y. & Jerv. 389.

(*x*) *Short* v. *Spackman*, 2 B. & Ad. 962; *Goom* v. *Aflalo*, 6 B. & C. 117.

ought to agree so as to establish the terms of the contract satisfactorily. In a case where they varied materially, insomuch that the principal could not recover upon them as a valid contract, the broker, who had been careless in drawing them up, was held responsible to his principal for the damage occasioned to him thereby, and also for the costs of an unsuccessful action brought upon them (*y*). In case of a material disagreement between the bought and sold notes, it appears now to be settled that the broker's book should be resorted to for the purpose of explaining the contract (*z*).

A *factor* is a person to whom goods are consigned for sale, for which he receives a compensation. The goods received by him are usually called a consignment. The possession and disposal of the goods are entrusted to him, and he has a special property in them, and a lien upon them for his demands, and herein consists the essential difference between a factor and a broker (*a*), for the latter has not the possession or disposal of the goods, and, consequently, no special property or lien (*b*). A factor may buy and sell goods in

(*y*) *Sievewright* v. *Richardson*, 19 L. Times R. 10; L. Campbell, N. P., 26th Feb. 1852.

(*z*) *Thornton* v. *Charles*, 9 M. & W. 809; Taylor on Evidence, vol. i. p. 300; but see *Sievewright* v. *Archibald*, 20 L. J., Q. B., 529.

(*a*) *Baring* v. *Corrie*, 2 B. & Ad. 137. In this case, the distinctions between a factor and a broker are fully discussed.

(*b*) *Baring* v. *Corrie*, 2 B. & Ad. 137.

his own name for another as apparent owner; this a broker cannot do. A factor cannot, without the assent of his principal, delegate his authority (*c*). The character of factor and broker may be united in one person (*d*). Where a factor, for an additional compensation, guarantees the payment to his principal of any debt due for goods sold on his behalf, he is said to act under a *del credere* commission. In such a case he is not primarily liable for the debt, but will only be answerable in case of the failure of the person for whose engagements he undertakes to answer (*e*).

A *ship's husband* is a person appointed by the owner of a ship to see to the repairs, equipment, management and other concerns of a ship; he may have his authority limited to certain acts, but in most cases he is understood to be the general agent of the owner in regard to all the affairs of a ship in the home port (*f*); but the consideration of his duties and powers are more properly to be referred to some work on shipping (*g*).

The master of a ship is a person employed to do all things relating to the usual employment of his ship. He has a very extensive authority; he may borrow money for the use of the ship, and, if

(*c*) *Cockran* v. *Irlam*, 2 M. & Sel. 301, n.
(*d*) 1 Bell, Comm. § 386.
(*e*) *Morris* v. *Cleasby*, 4 M. & Sel. 566.
(*f*) Story, § 35.
(*g*) See Abbott on Shipping, Part 1, ch. 3.

abroad, may hypothecate the ship or freight to raise money if necessary; and if money cannot otherwise be obtained he may sell part, if not the whole, of the ship; he, moreover, has authority over all persons in the ship in matter relating to her navigation and right ordering. He may delegate his authority in cases of necessity or sudden emergency (*h*). He may also hypothecate the cargo if he acts *bonâ fide* for the advantage of the owners thereof (*i*).

Partners are mutual agents for each other in all things relative to the partnership business. But their rights and liabilities *inter se*, and towards third persons, form an extensive subject of consideration beyond the strict limits of the law of agency (*j*).

Sharebrokers are persons employed in the buying or selling of shares for others, in return for which they receive a commission. They will, as much as other agents, be required to exercise what experience they are possessed of; but, in sales of shares, the instructions are generally given by the principal as to what shares they wish to be procured. In a case in which some forged scrip had been passing through the market, and a share-

(*h*) Abbott, Part 2, ch. 3; Smith, Merc. Law, p. 107, note.
(*i*) Story, § 36; "*The Geraldine*," 3 Robinson, 240.
(*j*) Collyer on Partnership, Bk. 2, ch. 2. As to partners being agents for one another, see *Vere* v. *Ashby*, 10 B. & C. 296.

broker had purchased some of it for his employer, who wished for some of the shares, it was held, he had fulfilled his commission by buying what passed in the market, under the impression that they were *bonâ fide* shares (*k*). Every sharebroker is bound by the usage of the Stock Exchange to which he belongs, and by the established mode of transacting business there. It is his duty, so far as he can, to obey the instructions of his principal, but the duty of following the established rules of the business he is engaged in is paramount, and there will be an implied authority to him from the principal to act according to these rules (*l*). In general, sharebrokers deal in their own names merely, not disclosing those of their principals; and it would appear to be immaterial which mode of proceeding they adopt. By analogy to the case of factors, attornies, &c., they have a lien on shares and scrip in their hands.

To the above distinct classes of agencies may be added the agency which is created, when two or more persons are appointed joint agents. The Courts were formerly very strict in their construction of agencies of this kind (*m*). It is a general

(*k*) *Lamert* v. *Heath*, 15 M. & W. 486; *Mitchell* v. *Newhall*, 15 M. & W. 308; both cases 15 L. J., Exch., 292, 298.
(*l*) *Sutton* v. *Tatham*, 10 Ad. & E. 27; *Bayliffe* v. *Butterworth*, 17 L. J., Exch., 78; *Bayley* v. *Wilkins*, 18 L. J., C. P., 273.
(*m*) Co. Litt. 181 b.

rule, that power given to two cannot be executed by one, though the other should die or refuse to act; for the authority is construed strictly as joint and not several (*n*). And an authority given to three jointly and severally must be executed either by all three or one only (*o*). But now the intention of the parties will be sought for (*p*); and if an authority be given to A. and B. or either of them, a joint or several execution thereof will be valid. And Mr. Justice Story lays it down that a more liberal interpretation in favour of trade should be admitted, and that in the case of a consignment to two factors (whether partners or not), each of them should be understood to possess the whole power over the goods for the purposes of the consignment, and that such factors are joint factors and co-obligors, and jointly accountable for one another for the whole (*q*). However, if no evidence of the usual course of proceeding is given, the power must be strictly followed; and where a member of a company was sought to be charged by the act of six out of eight persons, to whom an authority had been given to act together for the company, he was held not liable (*r*).

(*n*) Story, § 42.
(*o*) Co. Litt. 181 b.
(*p*) *Guthrie* v. *Armstrong*, 5 B. & Ald. 628.
(*q*) Story, § 44; *Godfrey* v. *Sanders*, 3 Wils. 94, 114.
(*r*) *Brown* v. *Andrew*, 18 L. J., Q. B., 153.

CHAPTER II.

THE DUTIES AND OBLIGATIONS OF AGENTS.

Sect. 1.

OF THE GENERAL DUTIES OF ALL CLASSES OF AGENTS.

The duties and obligations of agents to their principals now claim our attention.

It will be right, in the first place, to consider on what terms the agency is created, and whether the person employed is to receive a remuneration for his labour or not; for on this question it depends, whether it will be incumbent on him to undertake his task or not; and perhaps that is the only question which should depend on that inquiry, although by most writers the *mode* of the execution of the duty, and the amount of skill to be bestowed on it, has been referred thereto. The amount of skill which should be displayed, in any duty, ought surely to depend more on the question, whether from his vocation, conduct or representations, the person employed is presumed to be skilful and experienced in the matter entrusted to him. It would be absurd to say that a professional agent should

exercise a certain degree of skill, if he work for nothing, another degree, if he work for a small remuneration, and another if he be liberally paid. Such an agent should devote to his task all the skill of which he is possessed ; for his undertaking the employment prevents another person being employed. Whether he should use the same diligence as if he were remunerated is a question of circumstances ; but it is difficult to see why he should not, unless it can be shown that by taking no remuneration he means it to be understood that he is not acting professionally. On the other hand, if a person is foolish enough to pay a liberal sum to one not possessing skill in the kind of business committed to him, what could be more unreasonable than to expect more skill to be displayed by him on account of his remuneration than he would have exercised if he had received no recompense ? Unless, indeed, by his doing so he had held himself out as a person adequate to perform what was entrusted to him, he ought only to be expected to exhibit ordinary skill. The question ought to be, does he, by his receiving pay, hold himself out as possessed of an adequate equivalent of experience, which he will devote to the service of his employer ? Such an agent, however, should exercise a due amount of care and diligence. The amount of skill should be dependent

on the fact of his being a professional or not,—the amount of diligence on his being remunerated or not. In most of the cases which bear on the subject a principle, different to what has been above put forward, has been adopted.

If a man undertake to perform some duty, and it is at the same time agreed that a remuneration shall be paid to him, he is bound to fulfil the undertaking, and *to set about* and complete the duty; on his refusal to do so, he will be liable to an action for breach of contract. If, on the other hand, no remuneration is to be allowed him, it is not incumbent on him to commence the undertaking, as, his promise not being founded on any consideration, the maxim "*ex nudo pacto non oritur actio*" applies (*a*). But even in the latter case, if he once set about the work, he is bound to complete it, otherwise his principal might be inconvenienced, as he may, from the conduct of his agent, have been prevented employing another to do what was expected to be performed by the agent. Other questions, as we shall hereafter see, arise dependent on the fact of the remuneration or gratuitous labour of the agent; but they are subsequent to the commencement, or rather the completion of the work. Those we have above referred to are preliminary thereto.

(*a*) Smith, Merc. Law, p. 100; *Coggs* v. *Bernard*, 2 Ld. Raym. 909.

Previous to inquiring what are the duties which, in any case, a remunerated agent in his agency will be required to perform, it will be proper to state some of those which are binding on him in common with every other kind of agent, irrespective of the nature of their employment. Some of these are moral obligations, which will nevertheless be enforced by law, which always regards what course of dealing should influence men in their transactions with one another. In a case recently decided (*b*), the duty of an agent as a subject of a state has been considered; and it was declared, that a person appointed by a revolutionary party in a kingdom as their agent, will, on the restoration of the lawful sovereign, become liable to him for money received for public purposes from the subjects of that kingdom.

Moral obligations, which are enforced by law, may generally be traced to some legal maxim, or to some of the principles of the civil law. One of the rules, which will be found more particularly applicable to the relation of principal and agent, is the one "that good faith should always be observed;" and also the one that an agent cannot act, so as to bind his principal, where he has an adverse interest to him in himself. This rule, says Mr. Justice Story, is founded on the obvious con-

(*b*) *King of Sicily* v. *Wilson*, 5 Sim. N.S. 301.

sideration, that the principal bargains in the employment for the exercise of the disinterested skill, diligence and zeal of the agent for his exclusive benefit. The agent should act with a sole regard to the interests of his principal, for even impartiality would not be what the principal expects from his agent (*c*). To prevent the temptations which would arise from persons standing in a situation of confidence being permitted to turn their confidential relation to their own advantage the Courts both of Law and Equity have interposed to prevent agents making bargains with their employers. At the same time a principal may, if he chooses, waive the protection which the law affords him, if he is fully acquainted with all the circumstances at the time of his doing so.

From the principles above mentioned arises the rule, that an agent is not permitted to purchase of his employer anything which has been committed to him for sale, unless, indeed, there is the most open course of dealing between them, such as the communication on the part of his agent, of his intention to purchase, and of all other facts he is acquainted with in any way relating to the subject of the sale (*d*). This principle is equally applicable to an agent employed to purchase goods (*e*),

(*c*) Story, § 210.
(*d*) *Lowther* v. *Lowther*, 13 Ves. 103.
(*e*) *Massey* v. *Davies*, 3 Ves. jun. 217.

who will not be allowed to sell his own goods, without giving notice to his employer that they are his property, and a full disclosure of facts which would not be required of ordinary vendors. The ground on which this disability rests is no other than that principle, which dictates that no person can be both judge and party. No man can serve two masters (*f*). Again, the parts which the seller and buyer have to act are in direct opposition to each other, and this conflict of interest is the rock, for shunning which the disability has been established (*g*). This dictum is a sort of corollary from the principle laid down by Mr. Justice Story.

If, therefore, an agent, who is employed by another person to purchase property, purchase for himself, he will in Equity be treated as a trustee for his principal (*g*). An agent, who had purchased lands of his principal, was declared a trustee for him to the extent of a profit he had made on a resale: and, on a suit being brought against him by the principal, he was held bound to *disprove* certain facts, although the particulars of those facts had not been directly proved against him (*h*). If,

(*f*) 8 Bro. 63.

(*g*) 1 Addison on Contracts, 155; *Lees* v. *Nuttall*, 1 Russ. & My. 53. So, also, if he be employed to obtain a lease. *Taylor* v. *Salmon*, 4 My. & Cr. 134.

(*h*) *Barker* v. *Harrison*, 2 Coll. 546. An attorney wishing to purchase of his client may do so through the intervention of another attorney employed on behalf of his client.

in a transaction between a principal and his agent, it appears that there has been any underhand dealing by the agent, although the transaction may, in its general bearing, be perfectly fair, it has no validity in Equity. And, if the agent purchases of his principal, the sale may be set aside without its being proved that there was under-value in the price given (*i*). If an agent is employed by his principal to settle a debt, he cannot purchase it upon his own account; for he is bound to purchase upon the best terms which he can obtain for his principal, and he will only be entitled to the sum he actually paid for the debt (*k*). If an agent for the sale of goods buys them himself, without the assent and knowledge of the principal, it is competent generally to the latter to affirm and adopt, or to reject and disavow the transaction as between those two; and if there had been two or more of such transactions distinct from each other, to adopt or affirm one or more of them, and to reject or disavow the rest. It is incumbent on the agent to prove such knowledge and assent on the part of the principal (*l*). The same rule applies to other transactions of any kind between the principal and agent, as the protection of the principal is what the

(*i*) *Murphy* v. *O'Shea*, 2 Jo. & Lat. 420.
(*k*) *Reed* v. *Norris*, 2 M. & Cr. 361.
(*l*) *Bell* v. *Rea*, 18 L. Times, 312; per Lord Justice Knight Bruce, 22nd Jan. 1852.

Courts have most in view (*m*). Where an agent has purchased property of his principal, and the purchase ought to be set aside, the agent is bound to reconvey the property before a general account is taken (*n*). An agent of the seller cannot become the agent of the purchaser in the same transaction (*o*), with the exceptions before referred to, as to brokers and auctioneers. If it is a rule of law, that an agent should observe good faith towards his principal, it is almost superfluous to state that any contract made fraudulently on the part of the agent will not be upheld; and, in any such case, the agent will be liable in an action on the case for the deceit practised by him on his principal. An agent will be punished criminally for any embezzlement or fraudulent conversion of property committed to his charge by his principal (*p*).

Where a person stands in a relation of peculiar confidence with regard to another, as in the case of attorney and client, he will not be permitted in Equity to take a gift from his principal, unless he shows that he made no use of the influence or knowledge which he possessed. In short, he must, before he can take a gift or even enter into a transaction, place himself in the same position in which

(*m*) Story, § 214.
(*n*) *Trevelyan* v. *Chanter*, 9 Beav. 140.
(*o*) Story, § 212; *Wright* v. *Dannah*, 2 Camp. 203.
(*p*) 7 & 8 Geo. 4, c. 29, ss. 49, 52.

a stranger would have been (*q*). Thus, a voluntary settlement by a widow on a clergyman, who had obtained the control and management of her estates, was set aside as being obtained by undue influence by a person who stood towards her in a fiduciary situation (*r*). So also gifts of money, advowsons, leases, &c. by a ward to his guardian have been set aside (*s*). Bonds, gifts and other securities given by a client to his attorney, while the relation of attorney and client subsisted between the parties, have been decreed to be invalid, where the attorney has failed to prove that he dealt with his client at "arm's length," and without the exercise of undue influence (*t*). But if the attorney has exercised no deception, and all that passed appears to have been straightforward, such a transaction will be upheld (*u*).

It is the duty of all agents to keep a clear account of all receipts, payments and deliveries of whatsoever nature made on behalf of their principals (*x*), and also of any increase made by trading, or the receipt of interest, which has accrued to the

(*q*) *Hunter* v. *Atkins*, 3 My. & K. 135; see 2 Tud. L. Cas. in Equity, 435.
(*r*) *Huguenin* v. *Baseley*, 14 Ves. 273.
(*s*) *Hylton* v. *Hylton*, 2 Ves. 547; *Hatch* v. *Hatch*, 9 Ves. 292.
(*t*) *Wright* v. *Proud*, 13 Ves. 138; *Jones* v. *Thomas*, 2 Y. & C., Exch., 498.
(*u*) *Hunter* v. *Atkins*, 3 My. & K. 135, per Lord Brougham.
(*x*) *Lord Chedworth* v. *Edwards*, 8 Ves. jun. 49.

property while in their hands (*y*). This interest will always belong to the principal (*z*).

When an agent omits to render his account of sales, when reasonably required, after the sales are made, he will be presumed to have received the money, and will be accountable for the same; and in all cases of unreasonable delay, he will be charged with interest, whether he has made any or not. But if he has not received the money, he is in no default for not paying it over (*a*). In some cases it is the duty of the agent to invest money of the principal, so as to yield interest.

Agents are required to keep the property of their principals separate from their own, and if the place of deposit or investment be the same, should distinguish the one from the other in some manner. If they neglect to do so, should any loss be sustained, they will be required to make it good to the principal (*b*). And in such a case, the principal will not be bound by the accounts his agent furnishes; and, if the agent is unable to distinguish between the property of his principal and his own, the whole will be adjudged to belong to the principal (*c*).

(*y*) *Brown* v. *Litton*, P. Wms. 141; *Diplocke* v. *Blackburne*, 3 Camp. 43.
(*z*) *Diplocke* v. *Blackburne*, 3 Camp. 43.
(*a*) Story, § 204.
(*b*) *Wren* v. *Kerton*, 11 Ves. 382; *Lupton* v. *White*, 15 Ves. 432.
(*c*) *Clarke* v. *Tipping*, 9 Beav. 284.

A factor must not make untrue statements, such as are calculated to deceive his employer; and, although it may not appear that they have been the means of effecting fraud, his principal will be entitled to have the accounts duly taken from the beginning, and the relief, in such circumstances, will not be limited to a right to surcharge and falsify. A custom of trade to the effect that a factor may make such untrue statements, may secretly deduct or add at his pleasure to goods or sums of money represented to be received, cannot be legal, although no actual injustice may have been done to the principal (*d*).

If an agent refuses to account for goods which he has received on account of his principal, it will be presumed, after a time, that he has sold them, and he will be required to pay the proceeds, which it is reasonable to suppose he has obtained for them (*e*). No action lies for not accounting, until a demand of an account has been made (*f*). The most usual course of proceeding to recover money from an agent who refuses to account, is to bring an action for money had and received (*g*). But in this action it is necessary to prove the items sought to have been recovered: but should it not be in the

(*d*) Lord Langdale, *Clarke* v. *Tipping*, 9 Beav. 284.
(*e*) *Clarke* v. *Tipping*, 9 Beav. 284.
(*f*) 1 Taunt. 572
(*g*) *Tomkins* v. *Wiltshire*, 1 Marsh, 115.

power of the principal to prove these items (a case which rarely happens), a special action may be brought against the agent for his breach of duty in refusing to account (*h*). This action, however, cannot be brought for money delivered for a special purpose, until there has been a failure in applying it (*i*). If a man receives money, which he ought to apply in a particular manner, and does not apply it, an action for money had and received may be brought against him, and though a bill in equity may be proper in such a case, an action at law will be so likewise (*k*). A. employed B. to obtain payment of a bill drawn on a person resident in India, and B. accepted the employment, forwarded the bill to his agents, to whom it was paid; whereupon B. informed A. of the fact, but did not credit him with the amount. In consequence of some neglect on the part of B.'s agents, the sum was not received. It was held that A. might recover the amount from B., who was answerable for the conduct of his sub-agents (*l*). Where an account has been stated up to a certain time between a principal and his agent, but there was a continuation of the transactions between them, on an action being brought by the principal for a balance due

(*h*) *Wilkins* v. *Wilkins*, Salk. 9.
(*i*) Paley on Principal and Agent, p. 57.
(*k*) *Scott* v. *Surman*, Willes, 404.
(*l*) *Makersy* v. *Ramsage*, Cl. & Fin. 818.

on such account, a Court of Equity will not interfere or grant an injunction to restrain such action, if the plaintiff in the action at law swears the transactions are different, and adopts the account stated as correct (*m*). But if the accounts are intricate or difficult, or cannot be proved, application may be made to a Court of Equity to enforce an account (*n*). And this is now the almost universal practice in every case, and the action of account has become obsolete. Where certain consignments of oil were made to persons resident in England, during the voyage several of the casks in which the oil was contained leaked. Some part of the oil which escaped was wholly lost, but part was collected by the captain of the ship, and sold in the course of the voyage. It was held, that a bill in equity was sustainable by the consignees against the shipowner for an account of the oil lost and sold (*o*). "The right of the principal to an account rests upon the trust and confidence reposed by him in the agent (*p*)."

It seems that a Court of Equity will not decree an account where the transaction is single, and where no receipts and payments of a complicated

(*m*) *Dirom* v. *Cook*, 18 L. Times, 165; Master of Rolls, 15th Dec. 1851.

(*n*) *M'Kenzie* v. *Johnson*, 4 Madd. 373.

(*o*) *Jones* v. *Moore*, 4 Y. & Coll. 351.

(*p*) *Padwick* v. *Stanley*, 22 L. J., Ch., 184, per L. J. Turner. This case establishes that the right to account cannot be enforced by the agent.

nature have been mutually made, and where an action at law would be sufficient to do justice to both parties (*q*).

In most cases, a sub-agent is accountable only to his immediate superior, who has employed him, and not to the principal. Nor will an agent who has been appointed by a deceased part owner be accountable to the surviving part owners of a ship (*r*). Cases, however, may arise, where by the usage of trade the appropriate remedy of the principal is against the sub-agent. Perhaps the surest test to decide whether a sub-agent is accountable to the principal or not, is to ascertain if a privity of contract exists between them, and whether the sub-agent is employed to do something to effect the completion of which there is an implied authority on the part of the principal that his immediate agent should appoint a substitute. In no case can a suit be brought in equity against both an agent and a sub-agent. And, therefore, a bill by which a manager of certain property and his solicitor were both made defendants, was dismissed (*s*).

The same protection which the law gives to principals in their transactions directly with their

(*q*) *Navulshaw* v. *Brownrigg*, Sim., N. S.; *Stephen* v. *Badcock*, 3 B. & Ad. 354; *Pinto* v. *Santa*, 5 Taunt. 447.

(*r*) *Sims* v. *Brittain*, 4 B. & Ad. 375; *Goswell* v. *Dunkley*, 1 Str. 681.

(*s*) *Ireland* v. *Thompson*, 17 L. J., C. P., 248.

agents is also extended to cases where the interests of strangers are sought to be enforced by the agent adversely to the principal(*t*). Therefore an agent is not permitted to dispute the title of his principal(*u*), or to set up the adverse title of a third person. Thus, if a warehouseman has received the goods of his principal, and has once acknowledged his title, and agreed to hold the goods subject to his order, he will be estopped from setting up the title of a third person to the same goods, or otherwise defeating his rights (*x*). If a person has been acting as agent to a mining company abroad, and sums of money have become due to him from the company in the course of his employment, on some person undertaking the management of the mine and inducing him to make advances, he cannot claim a lien on consignments made to him by such manager for prior existing debts(*y*). But if the principal has obtained goods fraudulently from a third person, and the agent was not aware of the circumstance when he admitted the principal's title to them, the agent may, in such a case, dispute his title(*z*).

(*t*) *Lockwood* v. *Abdy*, 14 Sim. 437 ; Story, § 217.

(*u*) *Kieran* v. *Sandars*, 6 Ad. & E. 515 ; *Dixon* v. *Hammond*, 3 B. & A. 313.

(*x*) *Gosling* v. *Bornie*, 7 Bing. 339 ; 3 M. & P. 160 ; *Holl* v. *Griffin*, 10 Bing. 246.

(*y*) *Zulueta* v. *Vinent*, 19 L. Times, 330 ; Lord Truro, 12th Feb. 1852.

(*z*) *Hardman* v. *Wilcock*, 9 Bing. 382, n.; *Taylor* v. *Plumer*, 3 M. & Selw. 562.

To obey instructions.—It is the duty of every agent to do what he is expressly ordered to do. Much is dependent upon the particular words of the instructions in each individual case. But an agent must adopt the construction which is most reasonable. Thus, agents were directed, and on their part agreed, to remit the proceeds of goods consigned to them for sale, within a reasonable time after the receipt of the proceeds; and it was held that, on the receipt of part of the proceeds, they were bound to remit the same within a reasonable time, and were not to wait until they had received *all* the proceeds. In the same case words in a letter, "you *may* invest," &c., taking the context into consideration, were held to be directory, and not to give a discretionary power. "In short, it is only a courteous mode of ordering the silk to be purchased (*a*)." A factor may sell at such prices as he may, in the exercise of his discretion, think best for his employer; "but, if he receives goods subject to any special instructions, he is bound to obey them, and the authority, whether general or special, is revocable (*b*). If, however, the instructions delivered to an agent are capable of different interpretations, and the agent adopts one, when another is meant, the agent will have fulfilled his

(*a*) *Entwistle* v. *Dent*, 1 Exch. 812; 18 L. J., Exch., 138.
(*b*) *Smart* v. *Sandars*, 16 L. J., C. P., 258; 5 Com. B. 895.

duty, if he has acted in good faith (*c*). If an agent neglect to follow his instructions, he will not be permitted to take any profit made by disregard of his instructions (*d*). And he will also be responsible for any evil consequences which may result to his principal (*e*).

There are two qualifications to the duty of following instructions. The first is, that it is not the duty of an agent to do any act of an illegal or immoral nature, which his principal may require him to execute. Thus, if goods are bought or sold by an agent to be smuggled in violation of the laws of the country, no recovery or account can be had by either party of the same, *ex turpi causâ non oritur actio* (*f*). An agent employed to purchase indecent pictures will not be compelled to obey, or be answerable for a non-compliance with the instructions delivered to him. Even if the object be legal, but the agent is called upon to act in an illegal manner in any part of its carrying out, the whole of it is vitiated and rendered void; and the agent cannot recover compensation, even for his legal action; nor, on the other hand, can the principal enforce the performance by the agent of

(*c*) Story, § 74.
(*d*) *Boville* v. *Bradbury*, 2 Stark. N. P. C. 136; *Catlin* v. *Bell*, 1 Camp. 184.
(*e*) *Post*, 59.
(*f*) Story, § 195.

any part of the contract, or recover for a breach of his instructions (*l*).

The second qualification is, that if any sudden emergency occur, an agent is justified in acting in the manner which will best meet it, although in so doing he exceed or transgress his instructions, or the implied promise to follow the usual course of dealing in his particular calling or employment. Thus, if goods committed to an agent for sale are accidentally injured, they may be sold to prevent further loss. If goods or a ship are in danger of being lost by capture off a port for which they are destined, they may be taken to some other port (*m*).

It is the duty of an agent to execute the authority confided in him in a proper manner; so that, on the one hand his principal shall not be made answerable for more than it was his intention he should be, and on the other, the opposite party to the contract may not be tied so loosely, that it will be in his power to evade the performance of any part of what it was the intention of the principal he should be bound to execute. The agent also should execute the authority in such a manner, that it will be in the power of the principal alone to enforce the contract, without the necessity of the intervention of the agent or any other person.

(*l*) Story, § 195. (*m*) Ibid. § 193.

To follow usual course of dealing.—All agents must follow the usual course of dealing in the trade or employment in which they are engaged (*n*). This will vary according to the peculiar circumstances of each class of agency, or each particular object of employment, and is consequently of too great an extent to be treated of at length. The duties of agents in such cases may be called their *particular* duties, and are the consequence either of their particular business or their special undertaking, and are not, like those above noticed, required of them as a body, but merely of each individual, according to the circumstances of the case.

It is incumbent on all agents, and a promise is implied at law, even if there is no express engagement, if they undertake any charge or employment, to act in the execution of it with integrity and care. They must do the best in their power for their principals, and must give him the benefit of their judgment and experience (*o*).

And must use adequate amount of skill.—Where goods have been delivered to a bailee, to be safely kept or carried, or to have some work done upon them for hire to be paid to the bailee, if he is a person usually employed in dealings of a similar

(*n*) *Russell* v. *Palmer*, 2 Wilson, 325; *Sievewright* v. *Richardson*, 19 L. T. R. 10.

(*o*) *Dias* v. *Cruise*, 2 J. & Lat. 460; *Clarke* v. *Tipping*, 9 Beav. 284.

kind, and holds himself out publicly as possessing skill in the employment confided to him, he is bound to exercise a competent amount of skill in the execution of his duty. This amount of skill is such as is, and no more than is, ordinarily possessed and exercised by persons of common capacity engaged in the same business or employment. "The most satisfactory and reasonable way of determining whether an agent has exercised skill as a professional agent, is to show by evidence whether a majority, or even a moiety, out of a given number of skilful and experienced persons, would have acted as he has done (*p*). He must, moreover, exercise ordinary diligence and care in the preservation of any property entrusted to him. This ordinary diligence is such as persons of common prudence are accustomed to use in the conduct of their own affairs; if he be a professional agent, it will of course be incumbent on him to know in what manner this care should be bestowed. If he neglect to comply with the above requirements, he will be answerable for any loss resulting from his neglect (*q*). He must also use vigilance and energy in fulfilling his duty.

Upon a bill filed against the executors of a land steward and paid agent, it was held, that his estate

(*p*) Smith, Merc. Law, p. 92.
(*q*) *Coggs* v. *Bernard*, Smith, L. C. p. 82.

was liable to make good such sums as, but for his wilful neglect and default, he might have received (*r*). An action on the case may be maintained against an attorney for neglect in the discharge of his professional duties. Thus an attorney is bound to inquire into the security on which his client advances money, and if, through his neglect to do so, his client loses the sum he advances from insufficiency of the security, he is liable for the loss (*s*). If an attorney is appointed to conduct a suit, and he does not take the necessary steps therein, whereby the suit is dismissed, the attorney is liable for negligence (*t*). An insurance broker, who does not insert in a policy a condition usually found in similar policies, is liable for any loss resulting from his neglect (*u*).

If an uncommon or unexpected obstacle present itself, an agent must use efforts proportioned to the emergency to provide against it. Thus, where an accident to a ship might have been prevented by a sufficient number of hands being provided by the proprietor of a dock in which she was lying, it was held, that he was answerable for the damage she sustained, it being his duty to have a sufficient

(*r*) *Salisbury* v. *Morrice*, 11 L. J., Ch., 114.
(*s*) *Williams* v. *Jay*, 11 L. T., Q. B., 85.
(*t*) *Frankland* v. *Cole*, 2 Cr. & J. 590.
(*u*) *Mallough* v. *Barber*, 4 Camp. 150; *Dixon* v. *Hummond*, ibid. 344.

number of men to take precautions, when he saw the danger approaching (*x*). But a bailee of this description is not answerable for a mere accident, not resulting from his negligence (*y*). In the case of a common carrier, which we shall hereafter notice, the liability is extended much beyond the liability above mentioned.

But a professional agent, even if he work gratuitously, must use skill and diligence in his calling. In a case where a wrong entry of certain goods was made by a person, who gratuitously undertook the duty, in consequence of which wrong entry the goods were seized, Lord Loughborough said, "If a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a shipbroker or a clerk in the Custom House had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries (*z*). If a person rides a horse for another, for the purpose of showing his paces, on his being offered for sale, without any remuneration to him-

(*x*) *Leck* v. *Maestaer*, 1 Camp. 138.
(*y*) *Wilson* v. *Brett*, 11 M. & W. 113; *Garside* v. *Trent Navigation Company*, 4 T. R. 581.
(*z*) *Sheils* v. *Blackbourne*, 1 H. Bl. 161.

self, he is bound to use such skill as he possesses, and if he be proved to be experienced in that kind of employment, will be liable for an injury done by him to the horse through want of skill (*a*).

If a duty be committed to a person, who does not profess skill in the business, if he use such ability as he possesses, even though the duty be unskilfully performed, he stands excused, although he receives a remuneration for his work; it being the folly for any one to employ him without ascertaining the extent of an ability which the employed did not hold himself out as possessing (*b*). "If I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking, and the matter turns, in that case, on the express or special agreement which may be made between us (*c*)." But such unprofessional agent, if he work for hire, will be bound, notwithstanding his want

(*a*) See Sir W. Jones, 120; *Wilson* v. *Brett*, 11 M. & W. 113.

(*b*) "I conceive," says Sir Wm. Jones, "that where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions or a special undertaking, no more can fairly be demanded of him than the best of his ability." He then cites a specimen of Mahomedan law, in which, after a humorous case, it is intimated, "that if a man will employ a common mat maker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly." Sir W. Jones on Bailment, p. 99, ed. 1820.

(*c*) 3 Bl. Comm. 165.

of skill is excused, to bestow ordinary care on the things committed to him, and to use ordinary diligence in the completion of his duty; he will be liable to his principal for any loss resulting from much less than gross negligence.

If an agent is unprofessional *and* unremunerated, his former character will excuse him from an exercise of any skill which he does not induce others to suppose he possesses, and his latter will excuse him for anything short of gross negligence. Thus, where some money was entrusted to a person to keep without reward, and he placed it with his own in a taproom, which was broken into and the money abstracted, J. Patteson said, "It is agreed on all hands that the defendant (the bailee from whom the money was sought to be recovered by the bailor) is not liable, unless he has been guilty of gross negligence; it was, however, considered no proof that he was not grossly negligent, that he had lost his own at the same time (*d*).

Perhaps the three following propositions comprise the greater part of the law on the subject.

1. A professional agent must always exercise ordinary skill and diligence, whether remunerated or not.

2. A remunerated unprofessional agent must

(*d*) *Doorman* v. *Jenkins*, 2 Ad. & Ell. 256.

always exercise proper diligence and such skill as he chances to possess.

3. An unremunerated unprofessional agent is responsible only for gross neglect.

The principles above stated apply to agencies of every description, whether mercantile or domestic. There are, however, two kinds of agents to which they do not extend, who are bound by rules somewhat more stringent. These are common carriers and innkeepers, whose liabilities we will presently notice.

Sect. 2.

OF THE DUTIES OF AGENTS EMPLOYED TO BUY OR SELL.

Of agents employed to buy.—If an agent employed to buy goods has particular instructions as to price, he should, of course, obey these instructions. But, it appears he may do what, upon the whole, appears best for his employers; and, if he is instructed to buy two articles, he may, if it seems desirable, give a higher price for one article, if he can get the other at a lower (*e*). Where an agent is instructed to purchase, after having received the proceeds of sale of some goods entrusted to him

(*e*) *Cornwall* v. *Wilson*, 1 Ves. 509.

for sale, it does not mean that he is first to receive the *whole* proceeds of sale, but a part considerable enough to make it worth while to lay out the same (*f*).

An agent employed to purchase goods should exercise the best of his judgment as to the price at which he purchases. If he has no particular instructions, he ought not to give beyond what is the fair market value of the goods; and, if he exceeded the proper price for any goods, even if he were guilty of no fraud or collusion, he would probably only recover from his principal what was the fair market value of the goods (*g*). An agent is bound to obey his instructions as to the quality of goods directed to be purchased. He must also follow the course of dealing usually adopted in similar transactions (*h*). He must also use the best of his judgment and skill in ascertaining the quality of any article he is instructed to buy. And, if he purchases an article unsuited to the wants of his employer, he cannot recover from him the price he has paid (*i*). If an agent omit to perform any of the before-mentioned duties, he will be liable to his principal either for the breach of the implied con-

(*f*) *Entwistle* v. *Dent*, 18 L. J., Exch., 12.
(*g*) *Russell* v. *Palmer*, 2 Wils. 325.
(*h*) *Smart* v. *Sandars*, 16 L. J., C. P., 39.
(*i*) *Mainwaring* v. *Brandon*, 8 Taunt. 202; Paley, P. & A. p. 32.

tract on his part, or for any tort of which he has been guilty (*k*).

If goods that an agent has been directed to purchase should be forwarded to a principal residing at some distance, and on arriving at their destination they should turn out to be of a different quality to what he instructed his agent to purchase, the principal may not only reject them, but, *if he has advanced money for them*, and the expense of returning the goods would be greater than any diminution in price at the principal's place of business, but he may act as agent for his own agent, and may dispose of the goods. But this right can only be established through the medium of a Court of Equity, for at law the principal can only return the goods to his agent (*l*).

If an agent is instructed to purchase an article, in the quality and genuineness of which it is possible that the most skilful might be deceived, if he purchase what passes in the market as genuine, he will be absolved from all blame (*m*).

If goods purchased by an agent are good at the time of the purchase, but subsequently become damaged, the loss must be borne by the principal (*n*).

(*k*) *Boorman* v. *Brown*, 3 Q. B. 526, in error.

(*l*) *Cornwall* v. *Wilson*, 1 Ves. 509; but see note to Story, § 143.

(*m*) *Mitchell* v. *Newhall*, 15 L. J., Exch., 292; *Lamert* v. *Heath*, 15 L. J., Exch., 298.

(*n*) Story, § 202; Paley, P. & A. p. 32.

As soon as an agent has purchased goods, he should apprise his principal of his having done so (*o*). He should also forward the goods purchased to their destination in the way prescribed by his principal, either by his express directions, or by the past usage between them. If there be no express direction or past usage to guide the agent, he should adopt the most natural or usual mode of conveyance.

It is the duty of an agent to make a binding contract for his employer, and if he makes one, from which the party contracted with can escape, he will be liable to his principal for any loss sustained thereby (*p*).

If any customs or duties are payable on the goods to be transmitted to the principal, it is the duty of the agent to pay the duties and make such entries in respect thereof. If he fails to do so, he will be responsible himself (*q*).

It is the duty of an agent employed to purchase goods, if instructed to do so, and he has funds of his principal on hand, on the same being deposited in a warehouse or other place, to insure against loss by fire, or on their being forwarded to their destination by a sea voyage, to insure against

(*o*) Paley, P. & A. p. 39.
(*p*) *Sievewright* v. *Richardson*, before Lord Campbell, 26th Feb. 1852.
(*q*) *Lawson* v. *Kirk*, Cro. Jac. 255.

loss on the passage (*r*). And this he should do, although it may not be usual in similar cases. If it is usual to insure, the agent should insure, whether he has funds or not. If he performs one part of the agency, he should perform the whole, and if he wishes to avoid making advances, he should decline the agency, to which they are incidental altogether (*s*).

If an agent effects insurance, he should use his best skill and endeavours to make the insurance effectual; and for this purpose he should insert all proper clauses (*t*). He should ascertain the credit of the underwriters (*u*), and in case of a loss, should apply for the amount of the insurance. It has been said, that if an agent neglects to insure, he will himself be considered the insurer (*v*). But it does not seem necessary to resort to this fiction to make the agent liable for a breach of duty in not insuring (*w*).

If an agent does not effect insurance, where it is his duty to do so, he will be entitled to the same defence that an underwriter or party granting insurance would have been entitled to make, whether

(*r*) Story, § 190; *Smith* v. *Lascelles*, 2 T. R. 189.
(*s*) Story, § 190.
(*t*) *Smith* v. *Lascelles*, 1 T. R. 189; *Park* v. *Hammond*, 6 Taunt. 495.
(*u*) Story, § 191.
(*v*) *Wallace* v. *Telfair*, 2 T. R. 188.
(*w*) *Delaney* v. *Stodart*, 1 T. R. 157.

it be by showing that the policy would have been vitiated (*x*) or illegal (*y*); or, if the agent is limited as to the amount of premium he is to pay for insurance, he may show that he could not have effected a valid insurance at the rate named (*z*).

Of agents employed to sell goods.—The same general rules which apply to the case of an agent employed to buy goods also apply to that of an agent employed to sell. He must, therefore, obey his instructions, must be guided by the market value of the goods, if he has no instructions as to the price he is to ask, and must use his judgment as to the proper value of goods, if he has no instructions or market price to guide him (*a*).

The infallible guide in all agencies, the general usage of trade, must direct the agent employed to sell goods as to whether he is justified in selling on credit, or should sell only for ready money (*b*). If by the usage of trade an agent is justified in selling on credit, he should make all the same inquiries as to the solvency of the purchaser that a prudent person would do (*c*); and we may add, more than many vendors of goods themselves do, for no agent would be justified in giving the same credit for his

(*x*) *Delaney* v. *Stodart*, 1 T. R. 157.
(*y*) *Webster* v. *De Tastet*, 2 T. R. 157.
(*z*) Paley, P. & A. p. 21, and unreported case there cited.
(*a*) Story, § 198.
(*b*) Story, § 200; 12 Mod. 514.
(*c*) 12 Mod. 514; Paley, P. & A. p. 27.

principal that we see many persons in trade constantly doing on their own account. If an agent sells his own goods for ready money, and his principal's on credit, it is presumptive proof that he has his doubts as to the solvency of the buyer (*d*). If the agent omit to fulfil these requirements, he will be liable to his principal for any damage occasioned to him by such omission. Thus, if a commission agent undertakes to deliver the goods of the principal entrusted to him for sale, on payment of the price in ready money, he is liable for the wrongful act done by him, if he deliver the goods without receiving the price, and in such a case an action may be brought, either for the breach of the implied contract, or for the tort of which the agent has been guilty (*e*). An objection that an action of tort can only be brought on a *mis*feasance, and not on a *non*feasance, was overruled, on the ground that the distinction between the two was scarcely perceptible, and it was decided, that an action on the case could be brought where there was a simple nonperformance of a contract (*f*).

The same rules to which we must refer, in order to ascertain whether the agent should give credit or not, will be a guide in deciding what the length of credit should be.

(*d*) Paley, P. & A. p. 27.
(*e*) *Boorman* v. *Brown*, 3 Q. B. 526, in error.
(*f*) *S. C.*, and *Marzetti* v. *Williams*, 1 B. & Ad. 415.

The principal should have immediate notice of any sale effected on his behalf.

An agent must apply to the buyer of goods for payment as soon as the time agreed upon for payment arrives, and must use all due diligence in getting the money. If an agent takes the check of a person in good credit at the time of his taking the check, but such person subsequently becomes insolvent, the agent is discharged (*g*).

On receiving payment for any goods sold by him, the agent should place the money to his principal's credit, or should transmit it to him, or otherwise lodge it or dispose of it according to what his instructions or usual course of dealing with his principal may be (*h*). If a banker, with whom an agent has deposited his principal's money to the latter's credit (he being on good credit at the time of such deposit), subsequently fails, the agent will be discharged from liability (*i*).

Where an agent is employed to sell goods of a perishable nature, he may, if such a course seems best for his employer, sell them at a considerable sacrifice (*j*).

(*g*) Story, § 200.
(*h*) *Russell* v. *Hankey*, 6 T. R. 12; Story, § 202.
(*i*) *Ex parte Parsons*, Ambl. 219. This was the case of a trustee, but the principle is the same.
(*j*) Story, § 141.

Sect. 3.

DUTIES AND OBLIGATIONS OF AGENTS EMPLOYED TO RECEIVE OR DELIVER GOODS.

The duties and obligations of agents employed to receive and deliver goods are regulated by the same principles which govern the conduct of all other agents. But as has been above intimated, the liabilities of a *common carrier* are greater than those of ordinary agents. In most instances, persons employed to receive or deliver goods for the purpose of transmission to others are carriers, who may be divided into those *who are*, and those *who are not* common carriers.

Of the duties and liabilities of a common carrier it will be as well to say a few words. All who openly profess to carry passengers or goods for hire by land, or by water, are common carriers, and are bound to exercise their calling for all who are willing to employ them. He is, at common law, responsible for every injury sustained by any goods committed to him, occasioned by any means whatever, except the act of God or the king's enemies. His extraordinary liabilities were imposed upon him in consequence of the public nature of his employment, which rendered his good conduct a matter of importance to the whole community. When, by the increase of property, this liability

became intolerably dangerous, carriers began to post up and distribute written notices, to the effect that they would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. If this notice was not communicated to the employer, it was, of course, ineffectual. But if it would be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by its contents (*k*). For the purpose of adjusting the differences which afterwards arose between carriers and their employers on the construction of these notices, an act was passed to regulate the responsibility of carriers (*l*), by which it was enacted, that no one shall be entitled to recover the value of certain goods which are enumerated in the act (being chiefly of large value in a small compass), if lost by a carrier, if the value thereof in the aggregate exceed 10*l*., unless at the time of the delivery to such carrier the value of the goods has been declared, and an increased charge paid for the extra care, which is required to be taken of them (*m*). The carrier may demand for such articles an increased rate of charge, which is to be notified by a notice affixed in his office, and

(*k*) *Coggs* v. *Bernard*, 1 Smith, L. C. p. 82.
(*l*) 11 Geo. 4 & 1 Will. 4, c. 68.
(*m*) Sect. 1.

customers are bound thereby, without further proof of the notice having come to their knowledge (*n*). Carriers who omit to fix the notice are precluded from the benefit of the act, and they can no longer limit their responsibility in respect of articles not within the act (*o*). Special contracts, however, between the carrier and his employer are still allowed, and are not affected by the statute (*p*). By sec. 8, the act is not to protect carriers from their liability to answer for the felonious acts of their servants, nor is it to protect the carrier's servant from answering for his own neglect or misconduct. It has been held, that notwithstanding the statute, the carrier is still answerable for gross neglect on his part, which has occasioned a loss of property, such as the act directed to be insured, even although the owner has neglected to insure it; for the protection given to the carrier by this act is substituted for the protection which he formerly derived from his own notice, and the former, therefore, will not now protect him in a case, in which the latter, in consequence of his own neglect, would not have been allowed to do so (*q*).

Common carriers are bound to exercise the greatest possible care in the performance of their

(*n*) Sect. 2.
(*o*) Sect. 4.
(*p*) Sect. 6.
(*q*) *Owen* v. *Burnett*, 4 Twyr. 142.

duty (*r*). But it seems "that greatest possible care" only means what is generally bestowed in the custody of goods by persons in a similar situation; or what, if there is no usage to guide the conduct of the persons to whom they are committed, would reasonably be bestowed. Nothing in this life is done so perfectly as to be incapable of being done with greater care and caution (*s*); and, therefore, evidence will be received to show what had been usually done by the persons sought to be charged for a loss.

Carriers by water generally stipulate in their bills of lading that they shall be discharged from liability for losses occasioned by "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigations of what nature and kind soever," the first two of which exemptions they enjoyed at common, and that from loss by fire under 26 Geo. 3, c. 86, s. 2. In their charter-parties they also stipulate that they shall be protected from various risks. They are further protected by stat. 26 Geo. 3, c. 86, from making good loss or damage to any gold, silver, diamonds, watches, jewels or precious stones sustained by any robbery, embezzlement, making

(*r*) *Coggs* v. *Bernard*, Smith's L. Cases, p. 82; *Nurse* v. *Slue*, 2 Lev. 69.

(*s*) Per C. B. Pollock, *Rothschild* v. *R. M. Steam Company*, 19 L. T. 334.

away or secreting thereof, unless the owner or shipper has, at the time of shipping, declared the nature and value thereof in writing. 6 Geo. 4, c. 155, s. 53, exempts them from liability from damage arising from the want of a duly qualified pilot, unless incurred by their own refusal or neglect to take one on board; and by sec. 55 from liability for loss incurred through the default or incompetency of a licensed pilot. Where their common law liability remains, it is much narrowed by the following acts, viz., 7 Geo. 4, c. 15, which exempts them from making good losses incurred by the misconduct of the master and mariners, without their privity, to a greater extent than the value of the ship and freight (*s*). 26 Geo. 3, c. 86, sec. 1, which extends the above enactment to all cases of loss by robbery by whomsoever committed, and 53 Geo. 3, c. 159, which extends it to all cases of loss occasioned without their default or privity; but this act does not extend to vessels used solely on rivers or inland navigations, nor to any ship not duly registered according to law; nor do any of the acts extend to lighters and gabbets (*t*). It should also be observed that the benefit of the three last-mentioned acts extends to owners only, not to masters; and that the last act contains an express clause against re-

(*s*) See *Sutton* v. *Mitchell*, 1 T. R. 18.
(*t*) *Hunter* v. *M'Gown*, 1 Bligh, 573.

lieving the master, though he may happen also to be a part owner (*u*).

If a man, who is not a common carrier, receives goods for the purpose of conveying them, he must do his best to carry them safely; and a promise is implied that the goods shall be carried and kept safe from all hazards, which reasonable skill and care could have guarded against (*t*). It is obvious that many nice and intricate questions must arise between carriers, both common and others, and their employers, for which the reader is referred to other treatises (*u*).

Sect. 4.

LIABILITIES OF AGENTS TO THEIR PRINCIPALS.

Mr. Justice Story, in his work on agency, devotes a chapter to the consideration of the liabilities of agents. Now, the liabilities of agents to their principals can only arise on the neglect of some duty, or on some misfeasance in the course of their employment. Most of the rules, which apply to the nature and directness of any damage on a loss being caused by one person to another, apply with equal force to that occasioned to a principal by his

(*u*) See *Wilson* v. *Dickson*, 2 B. & A. 2.
(*t*) *Webb* v. *Page*, 6 Sc. N. R. 957; *Brind* v. *Dale*, 8 C. & P. 209.
(*u*) See Addison on Contracts (Carriers), vol. i.

agent; and, for any such loss, the agent will be bound to make full indemnity. In such cases it is wholly immaterial, whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation, which he has been obliged to make to third persons, in discharge of his liability to them for the acts or omission of his agent (*v*). Where the breach of duty is clear, it will, in the absence of all evidence of other damage, be presumed that the party has sustained a nominal damage (*w*).

A breach of any of the duties or obligations, which, as above mentioned, devolve on agents, will render them liable to the principal for any loss sustained thereby, if such loss is fairly attributable to such breach, as a natural and just consequence (*x*). There must be a real loss or actual damage, and not a merely probable or possible one. Thus, if a ship insured has deviated from the voyage, or if the insurance being illegal, the agent has neglected to follow his instructions to insure, the principal cannot recover, for he cannot have sustained any real loss by the neglect (*y*).

The appropriate form of action against an agent who has committed a breach of duty will, according

(*v*) Story, § 217 a.
(*w*) *Marzetti* v. *Williams*, 1 B. & Ad. 415.
(*x*) *Caffrey* v. *Darby*, 6 Ves. 490.
(*y*) Story, § 222.

to the nature of the case, be either a breach of contract, express or implied; or it may be an action for the *tort* committed by him. In some cases, it is at the election of the principal which form of action he will bring. It has recently been decided, that an action on the case for the wrong may be brought for a nonfeasance as well as for a misfeasance (*z*).

It is, as we have seen, one of the duties of an agent in making a contract to do all that will make it binding upon the party contracted with. If, therefore, a broker do not make a contract entered into on behalf of his principal binding on the opposite party, he will be liable to his principal for any damage resulting from the omission (*a*). If agents have received from their principals instructions which are directory, "as you may invest in the purchase of silk, &c.," but which they treat as discretionary and neglect to comply with, they are liable to their principals for the breach of contract (*b*). Where some oil had been delivered to a broker to dispose of for his employers, on the terms that it was to be paid for on delivery, but the broker permitted the purchaser to get possession of it without paying the price, he was held to be

(*z*) *Boorman* v. *Brown*, 3 Q. B. 526, in error.
(*a*) *Sievewright* v. *Richardson*, Lord Campbell, 20th February, 1852; 19 Law Times, 10.
(*b*) *Entwistle* v. *Dent*, 1 Exch. 812; 18 L. J., Exch., 138.

liable to an action for the tort arising from his negligence, as well as in assumpsit (*c*).

Of del credere commissions.—A *del credere* commission is one in which a person who is appointed agent, in consideration of a larger commission being allowed him, guarantees the payment by any persons to whom he disposes of any goods (*d*). A factor acting under a *del credere* commission, even if he had sold to a person in good credit, who had subsequently become insolvent, would be personally responsible to his principal for the amount (*e*). But, even in a case of *del credere* commission, a factor will not be held primarily liable to his principal, but will be treated as a surety for the person to whom the sale is made; and it is well established, that he is not liable to pay until a default has been made by the buyer (*f*). It seems that if the money is once received from the buyer, and it becomes necessary for the agent to remit the amount to his principal, and he does so by bills, which are dishonoured, the agent is still liable, and nothing short of the same payment, which would discharge the purchaser, is sufficient to absolve a factor under a *del credere* commission. He is not, like a common factor, discharged by the circum-

(*c*) *Boorman* v. *Brown*, 3 Q. B. 526, in error.
(*d*) Smith, M. L. p. 98.
(*e*) *Grove* v. *Dubois*, 1 T. R. 112.
(*f*) *Morris* v. *Cleasby*, 4 M. & Selw. 566.

stance of the parties to the bills being in good credit at the time when he took them, but must be at the risk of the remittances (*g*).

It would appear, that an agent who has received payment for something committed to him for sale, if the transaction is single, and apart from other matters, in which he is agent to the same principal, is bound to pay over the sum immediately it is received, and is not entitled to withhold payment until the general account is taken (*h*). And thus, where a conveyance has been made to an agent fraudulently, he must reconvey before he has the account taken (*i*).

Sect. 5.

DEFENCES OF AGENTS AGAINST CLAIMS OF THEIR PRINCIPALS.

The defences of agents against the claims made upon them by their principals may be the same that any other person may set up against any demands made upon them, as the illegality of the contract sought to be enforced, *damnum absque injuriâ*, and others. But perhaps the defence most commonly

(*g*) *Lucas* v. *Groning*, 7 Taunt. 164; *Mackenzie* v. *Scott*, 6 Bro. P. C. 280, Tomlin's edit.
(*h*) *Gordon* v. *Pym*, 3 Hare, 223.
(*i*) *Treveylan* v. *Chanter*, 9 Beav. 190.

relied upon by agents requires some notice, and this is the subsequent ratification of their acts and conduct by their principals, for *omnis ratihibitio retrotrahitur et mandato æquiparatur*. Where a principal, upon a full knowledge of all circumstances, deliberately ratifies the acts, contracts, or omissions of his agent, he will be bound thereby as fully to all intents and purposes as though he had originally given him direct authority in the premises, to the extent to which such acts, contracts, or omissions reach, if the agent, at the time of his acting, &c., assume to act as agent (*j*). Even where an agent assumes to act for a principal, without any authority to do so, or where he very much exceeds his authority, if he has *some* authority, the principal may subsequently ratify the act, and such ratification will be a good defence to an action brought against the agent by the principal, whether for breach of contract, or on the case for the tort (*k*). A ratification of a contract, required to be in writing, renders the agent who has made the contract a person duly authorized for that purpose (*l*). But the ratification must be made with a full knowledge of all circumstances, or it will not

(*j*) *Wilson* v. *Tummen*, 6 Sc. N. R. 904; *Doe* v. *Goldwin*, 2 Q. B. 143.
(*k*) *Smith* v. *Cadogan*, 2 T. R. 188, n.
(*l*) 2 Addison on Contracts, p. 690.

be binding upon ratifier (*m*). The recognition of the acts of a *sub*-agent will bind a principal, in the same manner as though he had given to his agent power to appoint such sub agent (*n*). Where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent (*o*). The principal must adopt the whole or none. A ratification once deliberately made upon full knowledge of the circumstances becomes *eo instanti* obligatory, and cannot afterwards be revoked or recalled (*p*). An agent had been secretly employed on behalf of a bankrupt to lay out some of his money in India bonds. The assignees discovered the fact, and seized some of the bonds which were in the agent's hands, and accepted them as part of the estate; and afterwards brought an action against the agent for the money with which the bonds were purchased. The Court was of opinion that the acceptance of some of the bonds was an affirmance of the agent's act in laying out the money, and that the assignees could not avow one part of the transaction and disavow another (*q*).

As to the mode of the ratification being made,

(*m*) *Horsfall* v. *Fauntleroy*, 10 B. & C. 755; Story, § 243.
(*n*) *Coles* v. *Trecothick*, 9 Ves. 236; Story, § 249.
(*o*) *Ferguson* v. *Carrington*, 9 B. & C. 59; *Smith* v. *Hodson*, 4 T. R. 211.
(*p*) *Smith* v. *Cadogan*, 2 T. R. 189, n.
(*q*) *Wilson* v. *Poulter*, 2 Str. 859.

of course an express ratification, whether by parol or in writing, will be sufficient to validate any previously void acts of the agent; but to make good an act, which the agent executes by sealing, such as a deed, the principal's assent must also be expressed by deed (*r*). The greater number of cases of ratification arise from some simple act of recognition, or some course of action on the part of the principal, from which his intended approval is implied; and slight circumstances and small matters are sometimes sufficient to raise the presumption of a ratification. Long acquiescence, and even silence, will sometimes amount thereto. Whether it so operates, depends much on the relation between the parties, their habits of business, and the usages of trade. Thus, among merchants, it is the duty of a merchant on receiving a letter from their correspondent, if he be his agent, living in some other place, to answer it within a reasonable time, or he will be presumed to admit the propriety of his correspondent's acts (*s*). If a principal, when goods have been sold by his agent without authority, should sue the purchaser for the amount, his doing so will be considered a ratification of the

(*r*) Story, § 252.

(*s*) *Prince* v. *Clark*, 1 B. & C. 186; Story, § 258. Mr. Story adds, even if no prior relation of principal and agent existed between the parties, if the party who has acted for another gives notice to him of what he has done, the silence of the latter affords a presumption that he ratifies the act.

sale; or, again, if he should sue the agent for money received on a sale.

It is a good defence if the misconduct of the agent has been followed by no loss or damage whatever to the principal; for *damnum absque injuriâ*, and *injuria absque damno* are equally objections to the recovery of any damages by the *principal*. A few instances, in which the principal cannot recover, if the agent sets up and establishes such a defence, have been stated already.

The agent may also defend himself by showing that he acted under an overwhelming necessity, or in a manner best suited to meet some extraordinary emergency. He may also set up as a defence that the act which he is instructed to perform was against public policy, and that if he had performed it, the principal would not have been permitted to take any advantage of it. So that it would seem to follow from this, that if a principal order his agent to sell any stock, which he has not at the time, no action could be maintained against the agent for his neglect to comply with his instructions; nor can the seller enforce the contract or maintain an action for the price of the stock. If the subject of the agency is illegal or immoral, the principal has no redress against the agent for any wrong done in that transaction. If goods have been committed to an agent, to procure their being

smuggled into a country, and sold there against its laws, the principal will be equally disabled to maintain a suit against the agent in the courts of that country for the goods themselves, as he will be to maintain a suit for the proceeds of the goods if sold. The rule in such cases is *melior est conditio possidentis.* But, it would appear, that if the principal repents and revokes his orders, before anything is done, he may recover back the money or goods delivered for the illegal purpose.

It will be a good defence, if an agent can prove that his authority was capable of two different constructions, and that acting fairly and in good faith, he adopted one which might reasonably be put upon it, although his principal might have intended that the other should be followed (*t*). We shall hereafter consider the ratification of contracts by principals with respect to third persons.

(*t*) Story, § 74; *Loraine* v. *Cartwright*, 3 Wash. Cir. 151; *Courcier* v. *Pulter*, 4 Wash. Cir. 551.

CHAPTER III.

THE RIGHTS OF AGENTS AGAINST THEIR PRINCIPALS.

Sect. 1.

RIGHT TO COMMISSION, EXPENSES, ETC.

On completion of the duty which they respectively undertake, both the agent to purchase and the agent to sell are entitled to their commission. If a certain amount has been fixed upon as their recompense, that will be the sum he is entitled to receive. If no agreement is made as to what he shall receive, he will be entitled to that amount of compensation which is usually paid in similar transactions, according to the custom of trade (*a*). In mercantile transactions, the amount of commission, if not fixed upon by special agreement, is easily ascertainable by the usage of trade, which also determines the cases in which it is due; and in some instances is so powerful, that although an agent may have taken trouble in the performance of the task committed to him, if nothing result

(*a*) *Eicke* v. *Mayer*, 3 Camp. 412; *Chapman* v. *De Tastet*, 2 Stark. 204.

from his labours, it takes away his right to remuneration (*b*). In some instances, the amount of commission payable is regulated by Act of Parliament, among others, that to solicitors or brokers for procuring a loan is fixed (*c*). If there be neither an agreement, a course of dealing, or an Act of Parliament, by which the right to receive compensation, or the extent of it can be ascertained, in case of any difference arising and an action being brought by the agent to recover compensation, the whole case must be left to a jury to determine the right and the value of the agent's services, when all that he does in that capacity must be taken into consideration (*d*). If an amount is payable to an agent by agreement, and he does any work in the discharge of his duty as agent, he cannot make any extra charge for that work; but if the service is beyond his duty as an agent, he may charge for it separately, and it is for a jury to decide the question (*e*). Where an agent claimed a commission for work and labour, a plea that he was a broker in the city of London, and was not duly licensed, was held bad; a broker must be a mediator between other persons, and *semble*, that brokerage must relate to goods and

(*b*) *Bull* v. *Price*, 5 M. & R. 2.
(*c*) 12 Anne, st. 2, c. 16, s. 2; 31 Geo. 2, c. 10, s. 30; 17 Geo. 3, c. 26.
(*d*) Story, § 336.
(*e*) *Marshall* v. *Parsons*, 9 Car. & P. 656.

money, and not merely to personal contracts for work and labour (*f*).

As a general rule, an agent cannot recover his commission until the completion of the duty for which it is payable (*g*), nor unless he performs the whole of the duty. But in certain cases compensation is recoverable, though the work committed to the agent be not completed. Thus, if an employer retains and enjoys the benefit of what was actually done, the employed may recover to the extent of his service (*h*). Where unforeseen circumstances or the conduct of the principal prevent the completion of the work, the person who has done anything under the contract has a right to sue *immediately* for compensation (*i*). A ship-broker's right to his commission does not depend on the fact of the ship earning freight, nor is it affected by her being lost (*k*).

An agent is entitled to be reimbursed all advances and payments he may have made, or any losses he may have sustained on his principal's account in the course of his employment (*l*). This is naturally implied from the very character of such agency.

(*f*) *Milford* v. *Hughes*, 16 L. J., Exch., 40.
(*g*) *Hammond* v. *Holliday*, 1 Car. & P. 384.
(*h*) *Farnsworth* v. *Garrard*, 1 Camp. 38; *Read* v. *Rann*, 10 B. & C. 439.
(*i*) *Robson* v. *Drummond*, 2 B. & Ad. 303; *Planché* v. *Colburn*, 8 Bing. 14. See *Cutter* v. *Powell*, 2 Smith, L. C. 14.
(*k*) *Hill* v. *Hitching*, 3 C. B. 306.
(*l*) *Betts* v. *Gibbins*, 2 Ad. & Ell. 57; *Rawlings* v. *Bell*, 1 C. B. 960.

Hence, all the incidental charges for warehouse room, duties, freight, general average, salvage, repairs, journeys, and other acts done to preserve the property of the principal, and which are necessary to the due completion of the duty which devolves upon the agent, are to be fully paid by the principal. So, if an agent has, at the express or implied request of his principal, necessarily incurred expenses in carrying or defending suits for the benefit of his principal, these expenses must be borne by the latter, and the agent will be entitled to recover them from him (*m*). And, although the acts done or expenses incurred have not been attended with all the benefit to the principal which was intended, if there was no defect of judgment or want of good faith on the part of the agent, he may recover these charges (*n*). But payment made officiously, and without authority, cannot be recovered (*o*). A broker, who makes payments in accordance with the rules of the Stock Exchange, may recover the amount paid from his principal, although he received no directions to make the payment (*p*). And an agent, who was required to incur certain expenses for the fulfilment of a contract which, by the usage of the Stock Exchange,

(*m*) Story, § 335.
(*n*) *Wolff* v. *Horncastle*, 1 Bos. & Pull. 323; Story, § 336.
(*o*) *Child* v. *Morley*, 8 T. R. 610; *Howard* v. *Tucker*, 1 B. & Ad. 712.
(*p*) *Bayley* v. *Wilkins*, 18 L. J., C. P., 273.

devolved upon him, was held entitled to recover all his expenses (*q*). A party who employs a broker at a particular place will be bound by an usage affecting the broker at that place (*r*). But in a case where some brokers, in accordance with the decision of a committee of the Stock Exchange in London, on the subject of the compensation to be allowed to the purchasers of some forged scrip, made a payment to the purchasers as agents of the sellers, they were held not entitled to recover the amount they had paid above the price at which the shares had been sold. Justice Maule said, "These rules of the Stock Exchange may be applicable to the sales of shares generally, but not to the sales of specific shares, and the decision of the committee may properly apply to the former kind of sale, but not to the latter (*s*). If an agent makes a payment for the principal, in the course of the agency, he is entitled to be repaid the amount, although the principal has not been discharged from liability by the payment (*t*). But such payment must be a *bonâ fide* payment, and not one made through carelessness (*t*). If an agent compromises an action which he might have de-

(*q*) *Bayliffe* v. *Butterworth*, 17 L. J., Exch., 78; *Sutton* v. *Tatham*, 10 Ad. & E. 27.
(*r*) *Pollock* v. *Stables*, 17 L. J., Q. B., 352.
(*s*) *Westropp* v. *Solomons*, 19 L. J., C. P., 1.
(*t*) *Brittain* v. *Lloyd*, 15 L. J., Exch., 43.

fended with some chance of success, but uses his best discretion in acting as he did, he may require his principal to indemnify him for the amount he has paid (*x*).

If an agent has incurred a loss in carrying on the business, without any default of his own, he will be entitled to compensation from his principal. As, if he makes a false representation in consequence of what has been told him by his principal, and he is compelled to pay damages on account of the representation, he may recover from his principal the amount paid (*y*). If he has become liable to third persons in following out the instructions of his principal, although the act done may have been tortious, he may recover the amount of the liability from his principal (*z*). But he cannot do so if he knows that he is doing a wrong, for there can be no contribution amongst wrong-doers (*a*). Thus, if an agent commits a wrong by converting the property of a third person, under the direction of his principal, and damages for the same are recovered by such third person, he may claim reimbursement from his principal. In a somewhat singular case, in which the fraud of the agent was

(*x*) *Pettmann* v. *Keble*, 19 L. J., C. P., 327, per L. C. J. Wilde and Maule, J., *dis.* Cresswell.

(*y*) *Southern* v. *How*, Bridg. 126.

(*z*) *Merryweather* v. *Nixon*, 8 T. R. 186; *Adamson* v. *Jarvis*, 4 Bing. 66.

(*a*) *Adamson* v. *Jarvis*, 4 Bing. 66.

permitted to be a defence to a set-off claimed against him by his principal, it was decided that money, which had been paid to an agent by a purchaser (which money was recovered by the purchaser on the ground of fraud in the agent), was in the nature of a deposit, and on the recovery of it by the purchaser, that it ceased to be money had and received to the use of the principal (*b*).

The loss or damage sustained by an agent in the course of his employment to entitle him to reimbursement from his principal must be the immediate consequence of the agency; if the loss be casual or remote, the principal is not liable for the same (*c*).

The right of the agent both to his commission and to the reimbursement of expenses incurred cannot be sustained, if the transaction out of which it arises is of an illegal nature (*d*). The distinction which was once raised between illegality resulting from a *malum prohibitum*, and one resulting from a *malum in se* is now repudiated (*e*). If an agent advances money to induce a person to sign a bankrupt's certificate, or for stock jobbing dif-

(*b*) *Murray* v. *Mann*, 17 L. J., Exch., 256.
(*c*) Story, § 341.
(*d*) *Cope* v. *Rowlands*, 2 M. & W. 157.
(*e*) Story, § 346; *Ex parte Mather*, 3 Ves. 373; *Langton* v. *Hughes*, 1 M. & Sel. 594.

ferences (*f*), or in payment of smuggled goods (*g*), having the interests or obligations of his principal in view, he would not be entitled to receive such payments *in pari delicto potior est conditio possidentis*, and therefore the law will not assist the agent to recover his expenses in such a case, nor the principal to recover the property if it has been disposed of.

An agent can always deduct any advances, expenses or losses lawfully incurred in the course of his employment from any funds of his principal in his hands (*h*). If he is a factor residing in a foreign country, and purchases goods for his principal, and consigns them to him, he is entitled to the same rights and remedies as a common vendor or consignor; and, consequently, has the right of stoppage *in transitu* in the same manner as other persons (*i*).

The conduct of the agent may be such as to deprive him of his right to recover either his commission or his expenses. Thus, neglect to keep an account, where it is his duty to do so (*k*), giving up his agency before it is completed (*l*), negligence,

(*f*) *Armorry* v. *Merryweather*, 2 B. & C. 573.
(*g*) *Ex parte Mather*, 3 Ves. 373.
(*h*) Story, § 350; *Siffkin* v. *Wray*, 6 East, 371.
(*i*) *Siffkin* v. *Wray*, 6 East, 371.
(*k*) *White* v. *Lady Lincoln*, 8 Ves. 371.
(*l*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909.

want of skill or misconduct in the execution of the business (*m*), will any of them take away his right. If the agent misapplies the funds of his principal, or acts adversely to his interests, he cannot recover his expenses or compensation (*n*). If his whole time is stipulated to be given to his employer, he cannot recover from another any compensation for services done for him during the same period. If an agent shows such want of judgment in purchasing goods for his principal, that he gives much more than their value for them, he cannot recover from his principal more than they are really worth (*o*), and would, moreover, lose his commission. If an agent sells to a person notoriously insolvent, if the service he renders to his principal be in some illegal transaction (*p*), if he acts adversely to the interests of his principal (*q*), or fraudulently misapply his funds, his right to his commission, and to his reimbursement of expenses are forfeited (*r*).

An agent cannot support a bill in equity for an account against his principal. Where a solicitor and agent filed a bill against his client and prin-

(*m*) *Denew* v. *Daverell*, 3 Camp. 451.
(*n*) *Thompson* v. *Havelock*, 1 Camp. 517.
(*o*) *Howell* v. *Harding*, 8 East, 362; *Howard* v. *Tucker*, 1 B. & Ad. 712.
(*p*) *Stackpole* v. *Earle*, 2 Wils. 133.
(*q*) *Hurst* v. *Holding*, 3 Taunt. 32.
(*r*) Story, § 334; *Toplis* v. *Grane*, 7 Scott, 641.

cipal for an account, it was held that the rights of principal and agent were not correlative. The right of the principal rests upon the trust and confidence reposed in the agent; but the agent does not repose any trust or confidence in the principal (*s*).

To recapitulate some of the rights of agents, and some of the means by which those rights may be taken away. Agents employed to buy or to sell may recover from their respective principals any sums they have expended in the course of their employment. But neither of such agents must incur unnecessary expense, or cause the loss for which he seeks indemnity, for in such a case they can neither recover their expenses nor any loss they may sustain. The illegality of the subject of the agency, or their own misconduct, may also deprive them of their rights.

Sect. 2.

of an agent's lien.

An agent has the additional security of a lien on any property of his principal in his hands (*t*). A lien is a right to retain property until a debt due to

(*s*) *Padwick* v. *Stanley*, 22 L. J., Ch., 184.
(*t*) *Mann* v. *Forrester*, 4 Camp. 60.

the person retaining it has been satisfied. It is either *particular* or *general;* the former is a right to retain the particular goods out of which the debt arises; the latter a right to hold any goods for the general balance of account (*u*). Both kinds are created either by contract between the parties (*x*), or the usage of trade (*y*).

All classes of agents are entitled to a particular lien for their work, labour or advances in and about their agency; for the Courts of Law go upon the supposition that there is always an implied agreement between the parties, that one who has a claim on the other for a debt should retain the thing on which the debt is founded for his reimbursement (*z*). This principle has not been extended to a lien for a general balance of account, or in other words a general lien; and any agreement that a person shall possess that right must be expressly proved, or the usage of trade must be firmly established that such right exists (*a*). As a general rule, a lien will only exist for certain and liquidated damages. And a debt, for which the lien is asserted, must be due to the person claiming it in his own right, and not as the agent of

(*u*) Smith, Merc. Law, p. 510.
(*x*) *Small* v. *Moats*, 9 Bing. 574.
(*y*) *Kerkman* v. *Shawcross*, 6 T. R. 14.
(*z*) *Scarfe* v. *Morgan*, 4 M. & W. 283.
(*a*) *Holderness* v. *Collinson*, 7 B. & C. 212.

another. And the balance due must arise out of similar transactions to the one from which the lien arises.

It is now firmly settled that a factor has a general lien upon all goods in his hands belonging to his principal for the balance of a general account (*b*), and even on the price of those with the possession of which he has parted (*c*) he has such lien also for all sums for which he has become surety, or otherwise liable for his principal, if the liability has resulted from his agency (*d*). But he has no lien for debts accrued before his character as factor commenced (*e*). Among others who have a general lien on goods in their possession may be mentioned Attornies, who have such lien on the papers of their clients in their hands, on monies received and judgments recovered (*f*). Bankers on bills deposited with them (*g*). Insurance brokers on policies of insurances and the monies received thereon (and this for the general balance of the insurance account) (*h*). Of course a lien may be created or excluded by special agreement. As has been previously ob-

(*b*) *Kruger* v. *Wilcox*, Ambler, 252; Story, § 376.
(*c*) Smith, Merc. Law, p. 515.
(*d*) *Hammond* v. *Barclay*, 2 East, 227.
(*e*) *Drinkwater* v. *Godwin*, Cowp. 251.
(*f*) *Stevenson* v. *Blakelock*, 1 M. & Sel. 535.
(*g*) *Ex parte Pemberton*, 18 Ves. 382.
(*h*) *Bosanquet* v. *Dudman*, 1 Stark. 1; *Westwood* v. *Bell*, 4 Camp. 349.

served, a person seeking to establish a general lien must do so by conclusive evidence. It is a matter of some doubt whether carriers have a general lien or not (*i*). An agent having a lien has none the less on that account a right to proceed against his principal *in personam*, to enforce his claims. This right, however, may be waived either by express or implied agreement.

A lien may be lost by the agent voluntarily parting with the possession of the goods, or by any agreement being entered into which renders the principle of a lien attaching inapplicable, such as the agreeing to hold the property for the benefit of some third person, or the taking a security for his lien, it being unreasonable that his lien should so long continue. A factor, however, on parting with the goods of his principal does not lose his lien, but it will attach on the proceeds of the sale in the hands of the vendee, and also on the securities in the hands of the factor. This exception to the general rule is made in favour of trade (*k*). Although a lien is lost by parting with the possession of the goods, should they again revert to the possession of the party claiming the lien, the right is restored,

(*i*) *Rushforth* v. *Hadfield*, 6 East, 519. See also *Aspinall* v. *Pickford*, 1 Bos. & P. 44. Mr. Justice Story seems to be of opinion that a general lien ought to be established by a carrier either from a general usage or special agreement, or a particular mode of dealing. § 382.

(*k*) *Houghton* v. *Matthews*, 3 Bos. & Pull. 485.

provided they be the property of the same owner against whom the right exists, and have been affected by no intervening equities (*m*). This rule refers to a general lien, and it seems doubtful whether it can be applied to a particular lien (*n*).

In general the right conferred by a lien is of a very limited nature. A person entrusted with the custody of goods cannot sell or dispose of the property in order to satisfy his lien, unless with the consent of the owner, either express or implied (*o*). Mr. Story in his work on agency seems to consider that from the nature of the employment of the factor such a right to sell is implied, and cites an American decision, and *Pothonier* v. *Dawson* (*p*), in support of his opinion. In a recent case, this doctrine has been repudiated, and it is now settled that there is not any principle of law by which a right to sell, at any time, without regard to the interests of his employer, is given to a factor (*q*). In the relation of principal and factor the goods are delivered for sale, on account of and for the benefit of the principal, and not by way of security to indemnify against a lien. The authority of the factor may become irrevocable when advances have been

(*m*) Story, § 370.
(*n*) *Jones* v. *Pearl*, 1 Str. 556; Story, § 370.
(*o*) Story, § 371; *Scott* v. *Franklin*, 15 East, 428.
(*p*) Holt's N. P. R. 383.
(*q*) *Smart* v. *Sandars*, 16 L. J., C. P., 45.

made; but there is nothing in the transaction from which it can be inferred that it was part of the contract, that at any time the goods should be forfeited, or the authority to sell enlarged, so as to enable the factor to sell at any time for their repayment of advances, without reference to its being for the interest of the principal to sell at that time and for that price" (*r*). It seems to be the opinion of Mr. Story that the lien of an agent extends over the whole property, and not only over as much as will satisfy his claim (*s*).

A lien is the personal privilege of the party, and cannot be set up by any third person against the principal, either as a defence, or as a cause of action (*t*).

Sect. 3.

RIGHTS OF SUB-AGENTS.

Where no privity exists between a principal and a sub-agent appointed by the immediate agent, the principal has no claims against the sub-agent, and, consequently, is not liable to him for any commis-

(*r*) *Smart* v. *Sandars*, per Tindal, C. J., 16 L. J., C. P., 45.
(*s*) Story, § 372. See *Davis* v. *Bowsher*, 5 T. R. 488.
(*t*) Story, § 372.

sion, advances, disbursements or their claims, unless he has adopted the acts of the sub-agent, or by subsequent assent ratified his appointment. But where a privity does exist, the sub-agent and the principal are mutually responsible. The principal will not be allowed to avail himself of the benefits of the transaction arising from the acts of the sub-agent, without subjecting himself to the burthens (*u*). Even if a principal does not directly ratify or adopt the appointment of a sub-agent, if he seeks to adopt any of his acts, or to avail himself of any benefit resulting therefrom, he must take them subject to the liabilities and claims which they entail (*x*). A sub-agent has not against the principal a lien on any goods which he holds between the principal and a third person for any sum due from that third person (*y*). But a sub-agent has by way of substitution the lien of his immediate employer for his general balance against the principal, where the privity we have mentioned exists (*z*). In some cases, more particularly those of policy brokers, a sub-agent is allowed a lien for a general balance of account against the principal, if, from the representations of his immediate em-

(*u*) *Snook* v. *Davidson*, 2 Camp. 218; *Mann* v. *Shiffner*, 2 East, 523.
(*x*) *Solly* v. *Rathbone*, 2 M. & Sel. 298.
(*y*) *Snook* v. *Davidson*, 2 Camp. 218.
(*z*) *Mann* v. *Shiffner*, 2 East, 523.

ployer, he had reason to believe that the agent who employed him was really the principal, but not otherwise (*a*). Perhaps the ground of this rule is, that the real principal has given to his agent a tacit consent to hold himself out as a principal, and, in this case, according to the judgment of C. J. Gibbs in *Westwood* v. *Bell* (*b*), the broker or sub-agent may be looked upon more as a third person claiming a right against the real principal, than as asserting his right as a sub-agent; and, in the case before him, he thought that the defendants, who had every reason to believe that the agent was the principal, were entitled to hold the policy. But, perhaps, the surest ground to go upon would be to prove that the principal has given an implied authority to the agent to appoint an assistant or substitute, and has by that means established a privity between himself and the sub-agent.

It may perhaps be reasonably inferred, that where a sub-agent is accountable only to his immediate superior, against him only can he enforce any rights he may claim, and we have seen above that a sub-agent is ordinarily only accountable to his immediate superior (*c*).

(*a*) Story, § 390, and note; *Mann* v. *Shiffner*, 2 East, 523.
(*b*) 4 Camp. 348.
(*c*) *Vide supra*, p. 83; *Ireland* v. *Thompson*, 17 L. J., C. P., 248.

CHAPTER IV.

THE AUTHORITY OF THE AGENT.

Sect. 1.

OF THE AUTHORITY OF THE AGENT GENERALLY.

The authority of the agent is generally defined by the instrument which appoints him, if a formal appointment in writing is used for that purpose. If, however, no definition of the authority intended to be conferred is made, the extent of it is generally dependent on the words used at the time of the appointment, or the mode of dealing usual between the parties. The appointment and the authority may be created by written instruments, but the greater number of agencies are created by mere verbal instructions, while many arise by implication from the conduct of the parties, the usual habit of dealing, and some even by mere tacit acquiescence on the part of the principal.

It is often very difficult to determine what powers are incidental to an authority, whether general or special. Mr. Justice Story says, they are deduced either from the nature and objects of

the particular act or agency, or from the particular business, employment or character of the agent himself. In some cases, the deduction is, in the absence of all contrary proofs, a mere inference of law; in others, it is a mere matter of fact, or an inference of fact; in others, again, it is a mixed question of law and fact. I can hardly think it would tend much to the elucidation of the subject, to mention certain powers which are treated as incidental to certain agencies, for every particular instance must depend upon its own peculiar circumstances. As a general rule, it may be laid down, that an authority is always construed to include all necessary and usual means of executing it with effect. We may, therefore, infer that whenever a person has authority to do a particular act, whatever is necessary to its completion may be done by him, and that the principal will be liable to third persons for any claims or contracts collaterally entered into for that purpose, if it be sufficiently apparent that they were necessary (*a*). Thus, if an agent is instructed to recover a debt due to his principal, he may give a receipt for the sum if paid; if he is instructed to insure, he may adjust a loss (*b*); if to settle losses on a policy, he

(*a*) *Howard* v. *Baillie*, 2 H. Bl. 618; Story, § 58.
(*b*) *Richardson* v. *Anderson*, 1 Camp. 43, n.

may refer the matter to arbitration (*c*); if he is employed to get a bill discounted, he may, if necessary, indorse it in his own name, if in doing so he is carrying out the intention of his principal (*d*).

All the various means, which are usual in the course of trade, to carry out any particular object, will be considered as incidental to the authority of the agent (*e*). As, for instance, where the master of a ship, which was wrecked in a foreign country, for the benefit of the owner of the ship and the owners of the cargo, disposes of both ship and cargo, he has authority to receive payment, for otherwise he would have to trust to the credit of the purchasers. And an authority to receive the proceeds involves an authority to order payment to such persons, as the agent thinks fit (*f*). But, ordinarily, an authority to sell does not import one to receive payment, for to do so it would be inconvenient, as it is for the interest of the vendor that he should, if possible, himself receive payment (*g*). An insurance broker has a right to receive payment of a loss, but he must not, in the absence of any evi-

(*c*) *Gordon* v. *Brooke*, 4 Camp. 163; *Backhouse* v. *Taylor*, 20 L. J., Q. B., 233.

(*d*) *Fenn* v. *Harrison*, 4 T. R. 177.

(*e*) *Wiltshire* v. *Sims*, 1 Camp. 258; *Scott* v. *Surman*, Willes, 407.

(*f*) *Ireland* v. *Thompson*, 17 L. J., C. P., 246.

(*g*) Per Maule, J., *Ireland* v. *Thompson*, *supra*; *Mynn* v. *Jolliffe*, 1 D. & R.; 1 Moo. & Rob. 326.

dence of consent to such a course, set it off against his own debt to the underwriter (*h*). An agent authorized to buy a cargo for his principal, if no other means are provided, has an incidental authority to give notes or draw or negotiate bills on his principal for the amount (*i*). Where the usual course of dealing, either of trade or in the previous transactions between the principal and agent justifies it, payment may be made by bill or note (*j*).

The authority which an agent possesses may, as between the parties themselves, be *limited* or *unlimited*, or it may, as between the principal and third parties, be *general* or *special*. And these distinctions it will be essential to keep in view; for a person may be a *general* agent in any business which his principal has entrusted to him, but he may, by his private instructions, be *limited* in the execution thereof. On the other hand, he may be a *special* agent, but his powers in the particular transaction may be *unlimited*. As between the principal and third persons, nothing turns upon these private instructions, unless they are known to the latter; but as between the principal and the agent, the private instructions are everything. Every authority which an agent has is either *real* or *apparent*, in relation to third parties; but we

(*h*) *Todd* v. *Reed*, 4 B. & Ald. 210.
(*i*) Story, § 103.
(*j*) *Thorold* v. *Smith*, 11 Mod. 71.

may premise, that whenever an agent by the sufferance of his principal, has an apparent power to bind his principal to certain acts, the principal will be as effectually bound as though the power had really and substantially been conveyed to the agent. If a factor is employed to sell goods in his character of a factor, who is usually empowered to sell on credit, he has, as far as third parties can see, an apparent authority to sell on credit, even though he has been expressly forbid to do so by his principal; and the latter will be bound by his contract, and cannot repudiate it on the ground of the agent's transgression of his instructions. On the other hand, if an agent is not publicly held out as possessing a general authority, persons are bound to be circumspect in their dealings with him, and inquire into the nature and extent of the authority actually conferred, although it might happen that the agent has very extensive powers confided to him.

It must be observed, that the language conferring the authority, however general, will be presumed to be used only in reference to the subject matter to which it relates (*k*), and although such language is found in very formal instruments, and it may have been the intention of the parties thereto, that

(*k*) *Murray* v. *East India Company*, 5 B. & Ald. 204.

a power should be exercised by the agent of a more extensive character (*l*). Thus, a letter of attorney given by an executrix, authorizing an agent "to receive all monies, to adjust accounts, &c., with full power to do and act, touching and concerning any of the premises as effectually to all intents, constructions and purposes as the giver of the authority could," was held not to authorize the agent to accept bills of exchange to charge the executrix in her own right for the debts of the testator (*m*). And in another case, where in a letter of attorney a power was given, "to make, do, execute, &c., all such acts, &c., as should be requisite, expedient and advisable to be done in the premises, and all other the affairs and concerns as the giver of the authority might or could do, if personally acting therein," has been held not to authorize the agent to accept a bill in the name of his principal (*n*). The extent of authority conferred by formal instruments of such a general character is never carried beyond that which is given in terms, or is necessary and proper for carrying the authority given by them into full effect (*o*). And with written instruments of a less formal character, a similar limitation of their authority to the immediate subject takes place (*p*).

(*l*) *Hogg* v. *Snaith*, 1 Taunt. 347.
(*m*) *Gardener* v. *Baillie*, 6 T. R. 591; Story, § 64.
(*n*) *Attwood* v. *Munnings*, 7 B. & C. 278.
(*o*) Story, § 68.
(*p*) Story, § 69.

Where the authority is a general one, conferred without any particular words, it is equally to be construed as having reference only to the subject matter of the authority. Therefore, where the agent of a wharfinger, whose duty it was to give receipts for goods received at the wharf, fraudulently gave a receipt for goods which he had not received, his principal was held not to be responsible, because such a receipt was not within the scope of his authority (*q*).

Where an authority is in such terms, that its language may fairly be interpreted in different ways, if the agent follows one which the principal did not intend, the principal will, nevertheless, be bound by his conduct; and in such a case the agent will not be responsible for putting a wrong construction on the words, if he has acted with good faith, for the fault is not his (*r*). But the most rational interpretation must always be put on the language of written instruments, and neither party will be allowed to escape from it by showing that some other construction might be put upon the words. And it is sometimes for the jury to decide what is the true interpretation of the agent's instructions, as, for instance, whether the words,

(*q*) *Coleman* v. *Riches*, 24 L. J., C. P., 125.
(*r*) Story, § 74.

"when duly honoured," in a letter, meant in the connexion duly accepted or duly paid (*s*).

Where an authority is conferred by a written instrument, as a general rule, parol evidence will not be admitted to contract or vary the terms thereof; but the usage of trade, or the declarations of the principal subsequent to the granting of the authority are admissible, for the purpose of construing or enlarging the authority which was conveyed by the instrument. And, in the same way, the declaration of the principal is admissible to show that he gave the authority for some other object. Thus, an agent may sell on credit, if the usage of trade is to that effect, although the written authority does not sanction such a proceeding. If the whole of the authority does not arise out of the writing, but, subsequently to its signature, some enlargement or curtailment of the authority takes place, parol evidence will be admitted to show the same. Thus, if an agent should be authorized in writing to purchase certain goods at a fixed price, but has been afterwards verbally instructed by the principal to give more than that price, evidence of such verbal instructions would be admitted, for it would in no way vary or contradict the written authority (*t*).

(*s*) Story, § 75; *Lucas* v. *Groning*, 7 Taunt. 164; *Mersell* v. *Frith*, 3 M. & W. 40.
(*t*) Story, § 80.

Although the principal may not have declared to his agent an extension of his authority, if he has represented to third persons, that his agent is empowered by him to exceed the limits of his written authority, he will be bound to the extent of what the agent does, if it be what such representations lead third persons to presume he may do (*u*). It may be taken as a general rule, that informal instruments, such as are commonly used for giving authority to mercantile agents, as letters of advice, &c., are to be construed liberally, such being essential to general confidence in mercantile transactions (*x*).

Sect. 2.

THE DIFFERENCE BETWEEN GENERAL AND PARTICULAR AGENCY.

A great number of the cases on the subject of the agent's authority to bind his principal turn upon the question, whether the agency is general or particular. A *general* agent is a person who is employed by another to transact all his business of a particular kind, and to do all things necessary for effectually carrying it out (*y*). Any person who,

(*u*) Story, § 81.
(*x*) Story, § 82.
(*y*) Smith, Merc. Law, p. 107.

from the conduct of his principal, appears to be a general agent, will be considered by the law as such, and will bind his principal in the same manner as though he were one; in what follows we shall, when speaking of a general agent, include in that term all those who apparently belong to that class, and shall consider it as understood that the principles and rules which are applicable to a general agent, hold good also with regard to an *apparently* general agent. A *particular* agent is a person specially employed to complete some single transaction (*z*).

The way to determine whether a person is a general or a particular agent, is to ascertain whether he has usually transacted business for his principal relative to, or of a like nature with the one he is employed in (*z*); or again, whether he is one of a class of persons who are usually employed to act for others in a *general* manner in some kind of business, as a factor to buy and sell goods, an attorney to transact all his law business. Any

(*z*) The employment of a person as agent on several occasions raises an implication that such an one has authority to bind his employer in similar business transactions. Cases have been in which it has been decided that employment on one occasion constituted a man a general agent; but the circumstances of each case vary so much that it is impossible to lay down any rule as to the number of times of employment from which a person will be considered as a general agent; but wherever reference is made to a past transaction, perhaps the authority will be more likely to be considered a general one than where each instance of employment is treated as quite independent of all prior dealings.

one who has any dealings with an agent, but looks to the principal for the fulfilment of any contract or engagement entered into by the former, should be careful, in the first place, to ascertain whether he falls under either of the above denominations. If he do not, or if under any circumstances there is a *special* delegation of authority, of which the third person is or ought to be cognizant, the agent will be a *particular* agent to perform any duty committed to him. It will then be incumbent on any person dealing with him to find out the extent of his authority; and if he allows him to exceed it the principal will not be bound to such third person by it, so far as it exceeds the power which was in fact granted to the agent (*a*). It will be also necessary to consider, even if the agent be a general agent, whether in any particular transaction he is fulfilling the ordinary duty of his agency, or is taking upon himself matters which are foreign to it (*b*).

Where an agent, in executing a written contract or indorsing a bill, makes reference to the authority under which he acts, a third person, in dealing with him, must satisfy himself as to the extent of his authority; and, if he neglects to do so, he has no

(*a*) *Alexander* v. *Alexander*, 2 Ves. 644.
(*b*) *Hubbersty* v. *Ward*, 22 L. J., Exch., 113; *Coleman* v. *Riches*, 24 L. J., C. P., 125.

other security to rely upon than the credit of the agent. Where a company allows an agent to sign bills on their behalf, it would import that he has a general authority to do so; but the words "per procuration," used by the agent, would be notice of a special authority, which a third person is bound to refer to, and he must bear the loss resulting from a neglect to do so (*c*). And a third person must do the same, if a clerk receiving payment for the principal of his employer refers to his authority (*d*). But it must not be supposed that it is incumbent on any one to inquire into the private instructions which have been delivered to the agent by his principal, it is enough if he examines the instrument which confers the authority.

A principal who consigns goods to an agent to sell will, in most cases, be bound, although the agent sells in a manner quite contrary to his instructions. Where a commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe (*e*). And, wherever a principal to all appearances by his silence acquiesces in the sale of his agent, he will be bound by the sale (*f*). By the stat. 6 Geo. 4, c. 94, s. 4 (which is called the

(*c*) *Alexander* v. *Mackenzie*, 18 L. J., C. P., 94. See *Nicholls* v. *Diamond*, 23 L. J., Exch., 1.
(*d*) *Kaye* v. *Brett*, 19 L. J., Exch., 347.
(*e*) *Pickering* v. *Busk*, 15 East, 43.
(*f*) *Gregg* v. *Wells*, 10 Ad. & E. 90.

Factors' Act, and refers more particularly to that class of agents, and which was passed to obviate the difficulties which frequently arose among mercantile men in their transactions with factors), it is enacted, that any person may contract with an agent entrusted with goods, and may receive the same of, and pay for the same to such agent, and such contract on payment shall be binding upon and good against any owner of the goods, notwithstanding the person dealing with the agent knew at the time that he was only an agent; provided that the contract or payment were made in the ordinary course of business, and without notice that the agent was not authorized to sell the goods or to receive the purchase-money. "Here, although you are dealing with an agent, if you do not know that he has not authority to sell, you are perfectly safe on buying the goods" (*g*). By sect. 2 of the Act above referred to, persons in possession of bills of lading, &c. are to be deemed the true owners of the goods mentioned therein, so as to give effect to any sale or disposition thereof by them to any other persons, provided such persons had not notice that the persons intrusted were not the actual owners thereof. That section was to operate in the case of a person who was dealing with an

(*g*) *Per* Lord St. Leonards, in *Navulshaw* v. *Brownrigg*, 2 Sim. N. S., and 21 L. J., Ch., 908.

agent, not knowing him to be such, apparently as owner. "Under 6 Geo. 4, you might purchase from a known agent, provided it was in the usual course of business, and that you did not know that the agent had not authority. These two things only were necessary to give effect to a sale by even a known agent" (*h*).

Even if the agent does not stand in the relation of a servant, foreman or the like, the fact of his having been previously employed, or his previous acts being sanctioned by his principal, raises an implication that he has a general authority to bind his principal in a similar manner for the future. And, where no general authority to do any act is to be implied from the existing relation between the employer and the employed, the past course of dealing must be looked to in order to ascertain whether acts of an agent of a similar character have been adopted or assented by the principal. Thus, where an iron merchant sent a waterman to procure iron for him, but did not pay for it at the time, though he subsequently did so; on the same waterman obtaining some iron in the name of his employer, the employer was held to be liable for the same on the ground of a general authority (*i*). Even in the case of a domestic servant, whether a

(*h*) *Per* Lord St. Leonards, in *Navulshaw* v. *Brownrigg*, 21 L. J., Ch., 908.

(*i*) *Hazard* v. *Treadwell*, 1 Str. 506.

master is chargeable in the case of credit being given to the servant appears to depend on the fact of the master having sanctioned his dealing on credit or not; if he has not expressly assented to it, or has been in the habit of giving the servant money wherewith to pay for the goods he procures, he ought to be discharged from liability. In one case (*k*) Lord Ellenborough said, "If the master gave the money before the goods were bought, the master would be discharged; but, if after, he would be liable, for that would amount to an authority to buy on credit."

Although it may appear that the Courts on some occasions relieve principals from the acts and contracts of their general agents, and leave third persons to their remedies against the latter, it will generally be found that the general authority did not comprehend the course of proceeding which has been adopted, and that a *want of due caution and inquiry* has been manifested by the third persons who seek to charge the principal, and that acts previously sanctioned do not warrant the presumption attempted to be established. An instance of this presents itself in the case of a servant who was in the habit of paying for goods supplied to her master by a tradesman out of money received by her for that purpose; she paid accordingly

(*k*) *Rusby* v. *Scarlett*, 5 Esp. 76.

whenever the bills amounted to a few shillings; in this case it was held, that the tradesman was not entitled to recover from the master 33*l.*, which the servant, having all the time received money from her master to pay the bills, had allowed the bills to amount to. But, it appears, that had not the master given the servant the money in the manner he had done at first, the tradesman might have recovered. In this case a want of due care and inquiry was evinced by the tradesman, who neglected to ascertain the reason of the change in the periods and manner of payment, and we accordingly see the maxim, "*vigilantibus non dormientibus leges subveniunt*," illustrated (*l*). The extent of the authority conferred on the agent of course must always be considered by a third person previous to his doing anything for which he intends to charge the principal. Thus, a surgeon, who was called in by the guard of a railway company to attend a patient who had been accidentally injured on a railway, was held not entitled to recover the amount of his charges for professional attendance from the railway company by whom such guard was employed (*m*). The power to enter into such a contract was not incident to the employment of the guard. The employer of an agent for a particular

(*l*) *Stubbing* v. *Huntz*, 1 Peake, 66.

(*m*) *Cox* v. *Midland Railway Company*, 5 Ol. B. & Lef. Railway Cases, 583.

purpose gives only the authority necessary for that agency under ordinary circumstances. The employment of an agent gives also the power usually exercised by similar agents, but there was no evidence of any usage in this case. The fact of similar payments having been made on previous occasions was held not to afford sufficient evidence to go to the jury of a special authority to make the contract in question (*m*). The appointment of a managing committee by the provisional committee of a railway does not constitute the managing committee their agents, so as to enable them to pledge the former's credit (*n*). A railway company was sought to be charged by a cheque drawn by three of the directors, signed by them in their own names, and countersigned by the secretary of the company; but it was held that the company was not bound by the cheque, or liable upon it, although it was stated that many of a similar kind had been drawn and paid, the ground of the decision being that it was a fraud upon the company which they never authorized (*o*).

(*m*) *Cox* v. *Midland Railway Company*, *supra*, p. 101.

(*n*) *Williams* v. *Piggott*, 5 Ol. B. & Lef. Railway Cases, 544.

(*o*) *Sewell* v. *Derbyshire Railway Company*. The decision in this case seems to go on the ground that there was originally no authority from the company to the directors to draw the document purporting to be a cheque, but it may be doubted whether if the company had been in the habit of paying similar cheques (which did not appear in evidence), there would not have arisen an implied authority to bind them thereby as to third parties. 19 L. J., C. P., 371.

Whether an implied authority to bind the principal exists or not is always a question for the jury, to be decided by a consideration of surrounding circumstances. The public exercise by the agent of his functions will always raise a presumption that his principal was cognizant of and approved his acts.

Although it refers more to the determination of the agency (to be noticed hereafter), it may not be out of place to observe, that it is incumbent on the principal to make the cessation of his agent's authority as notorious as its existence was; and that he need not give such full notice of the revocation of an authority which is a notoriously special one, as of a general authority to carry on any continuous business (*p*).

Sect. 3.

WHERE EXCESS OF AUTHORITY IS JUSTIFIED BY CIRCUMSTANCES.

Having considered in what cases general agents may bind their principals, by acting within the scope of their authority, and in what they will be discharged by the agent exceeding his authority, let us now examine a few cases, in which, notwith-

(*p*) 2 Addison on Contracts, p. 693.

standing an excess of authority *as intended by the principal*, the latter will be bound, in consequence of the act or contract being called for by some sudden contingency or emergency. Where there is such emergency, such act or contract will be interpreted by the Courts as comprised within the authority; under such circumstances an agent's acts fairly done will be binding upon his principal. Thus, a factor will be justified in deviating from his orders directing him to sell at a stipulated price, if the goods are of a perishable nature, and the sale is indispensable to prevent a greater loss or a total loss, and such sale will be binding on the principal (*q*). The master of a ship acquires, in the same way, a superinduced authority over the cargo of the ship in cases of necessity, not belonging to his ordinary agency (*r*). We may suppose an agent, say a factor, to have been directed to purchase some articles of a particular person, and to forward them immediately, as time was a matter of importance; it can hardly be supposed, if he were to find the persons he was directed to deal with unable to supply the goods immediately, and he accordingly procured them of some third person, that the contract would not be binding on the principal, whose main intention evidently was to have goods of the

(*q*) Story, § 141.
(*r*) "*The Gratitudine*," 3 Rob. 255.

description specified immediately. Upon the same ground, perhaps, an agent not generally authorized to insure might, in unforeseen exigencies, to prevent an irreparable loss to his principal, might acquire a right to insure, and such insurance would be binding on the principal (*s*). Cases have arisen in Courts of Equity, in which it has been laid down, that a person to whom goods were consigned from abroad by a foreign factor, employed by him, on finding that they were not of the description required, and repudiating the transaction, was at liberty to act as an agent from necessity, for the original factor, and, if it was for the advantage of the factor, that he might dispose of the goods on his account (*t*). Courts of Law, however, do not appear to have extended the principle quite so far; and if an unusual contingency arises, it does not follow that an agent will have the power to do that which would enable him to meet the contingency in the best manner. It has been decided at law, that there is no implied authority in any agent to borrow money on account of his principal, except he be a master of a ship, or the acceptor

(*s*) *Wolf* v. *Horncastle*, 1 Bos. & Pull. 323.

(*t*) *Cornwall* v. *Wilson*, 1 Ves. 509; and Lord Eldon expressed his opinion that a jury would have no hesitation in saying that he ought to be considered, if he pleased, not as a purchaser, but as placed by the vendor in a situation in which acting prudently for him he was an agent. *Kemp* v. *Pryor*, 7 Ves. jun. 240.

of a bill for the honor of the drawer (*u*), although it might be for the advantage of his principal to do so.

The question may often arise, whether an act is wholly void or not, when the agent does more or less than he is authorized to do. Ordinarily, where there is a complete execution of the authority, and something *ex abundanti* is added, which is improper, the execution is good and the excess only is void. But where there is not a complete execution of the power, or where the boundaries between the excess and the rightful execution are not distinguishable, the whole will be void.

The general principle is, that the principal is not bound by the unauthorized acts of his agent, but is bound where the authority is pursued, so far as it is *distinctly* pursued. As if an agent were authorized to procure insurance upon a ship for a certain amount, and he should procure a policy for that amount on the ship, and a similar amount on the cargo, the policy would be good as to the ship and void as to the cargo, because here the excess of authority is clearly distinguishable (*x*). But if an agent were authorized to sign a note, payable in six months, and he should sign one payable in sixty days, the whole would be void, for there is no

(*u*) *Hawtwayne* v. *Bourne*, 7 M. & W. 597.
(*x*) Story, §§ 166, 170, 172.

point of distinction between the limit and the excess of authority. The question, however, ought to be, what was the true nature and limits of the authority. If it is exceeded in a substantial matter it will not be obligatory on the principal; and thus, if an agent should purchase goods for less than he is directed to buy them by the principal, it will be obligatory on the principal; if he purchase for more it will not be so, for the substance of the authority is to purchase for a certain amount, and it is an excess of the authority in a substantial particular (*y*).

Sect. 4.

OF THE EXTENT OF AUTHORITY AMONG NON-MERCANTILE AGENTS.

It has been stated above, that persons having a general authority expressly given to them by their principals, or standing in certain relations to their employers, or having been employed by them in a similar matter on former occasions, have a general authority to bind them by their acts. Mercantile agents, as factors and brokers, and we may add attornies, have a general authority to bind their principals in matters connected with their employ-

(*y*) Story, §§ 166, 170, 172.

ment; and, as regards the question of what acts are within the scope of their authority, there is not often much dispute, the extent of their authority being pretty well ascertained by the usage of trade. In such cases, the extent and incidents of authority have been so accurately defined, by the common negociations of commerce, and by the frequent recognitions of courts of justice, as to have become matters of legal intendment and inference, and not open to controversy (z). But agencies and the extent of authority conferred on them frequently arise from implication or presumption, and the inquiry as to the powers is to be deduced from the particular business or employment, and from a consideration of the matters of fact bearing thereupon. In the following instances among non-mercantile agents, authority to do certain acts to bind their employers has been implied. Servants, clerks, shopmen, foremen, and the like, have an implied general authority to bind their employers in the matters in reference to which they are employed. A master is chargeable if his servant contracts for him in the usual course of business, although he has no authority in the particular instance. And a person who employs a clerk will be bound, in a similar manner, by the act of his clerk, although the act may be contrary

(z) Story, § 106.

to his private instructions (*a*). A foreman, intrusted with the general management of a trade, has a general authority to enter into all contracts usual in the carrying on of that trade. Where, then, the foreman of a saw mill took an order for the delivery of a quantity of fir staves within a particular time, and failed in the fulfilment of the contract, the proprietor of the mill was held responsible for the breach of contract (*b*). The consent of the under-viewer of certain collieries and the resident managing agent to the appointment of an arbitrator in a particular way, was held to bind the principal, who was the owner of the collieries (*c*).

Sect. 5.

OF THE EXTENT OF AUTHORITY AMONG CERTAIN CLASSES OF AGENTS.

We will now notice the extent of authority which the usage of trade has established among certain particular classes of agents, who are more frequently employed in mercantile transactions. The extent of this authority is not dependent upon the words conveying it, but upon custom.

(*a*) Story, § 56.
(*b*) *Richardson* v. *Cartwright*, 1 Car. & Kir. 328.
(*c*) *Backhouse* v. *Taylor*, 20 L. J., Q. B., 233.

Masters of ships have various powers and authorities incidental to their office, which have been established by the maritime law, and which are dependent on the various contingencies which happen in the course of their employment. To these powers the ordinary principles of the law of agency are not altogether applicable. The master has authority to procure all necessary supplies and repairs for the ship, and has a power to pledge the credit of the owners of the vessel, and, for the purpose of raising money for such things as are necessary for the due prosecution of the voyage, to pledge the ship (*d*). Among these necessary things may be enumerated the wages of seamen, the clearance of the ship, the procuring of necessaries. But it must be for the completion of the voyage that he borrows the money; and it seems where the voyage is at an end, or where the master has any means of communicating with the owners (which he generally has in a home port), that he will not have the authority referred to (*e*). In a recent case Jervis, L. C. J., said, "The right to raise money on bottomry can only be justified by necessity. If a master in a foreign country wants money, he must, in the first instance, endeavour to raise it on

(*d*) *Hawtwayne* v. *Bourne*, 7 M. & W. 599.

(*e*) *Johns* v. *Simons*, 2 Q. B. 425; *Beldon* v. *Campbell*, 20 L. J., Exch., 343. By which case it appears that *Robinson* v. *Lyall*, 7 Price, 792, is not law.

the credit of the owners. If he can do so, he has no authority to hypothecate the vessel; but if he cannot otherwise obtain the money, he may hypothecate the ship, not transferring the property in the ship, but giving the creditor a claim upon it, to be carried into effect by legal process on the termination of the voyage. There is no trace in our books, with the exception of Sansum *v.* Bragginton, of any case in which a master has been held to have authority to make a valid hypothecation of a ship, unless the payment of the money borrowed has been made to depend on the arrival of the ship. There is, therefore, nothing to show that a master has authority to hypothecate a ship in any other manner (*f*). The master's authority extends to the cargo, and he may, in cases of extreme emergency, get rid of it or dispose of it in any way which is necessary for the preservation of the ship or the lives of the seamen, or which is in the exercise of his judgment for the advantage of the owner of the cargo. He may also sell a part of the cargo, or hypothecate the cargo and freight as well as the ship for any repairs to enable her to perform her voyage (*g*). In his power of diposing of the cargo, the master is treated as the agent for the owner thereof. If, however, he disposes of the

(*f*) *Stainbank* v. *Fenning*, 20 L. J., C. P., 226; *semble*, *Sausam* v. *Bragginton*, 1 Ves. 443, is not law.

(*g*) "*The Gratitudine*," 3 Rob. 255, in which case the authority of masters of ships is very fully considered.

cargo in any manner which is not warranted by circumstances, there is an implied indemnity on the part of the owners of the ship, to make good any loss sustained by the owner of the cargo in consequence of the conduct of the master. Where a ship is totally wrecked in a distant country, and a large part of the cargo is damaged, there can be no doubt of the right of the master of the ship to sell (*h*).

Where the ship is in the home port, the authority of the master is somewhat circumscribed ; and wherever direct communication can be had with the owners of the ship, they should be applied to by third persons in all matters over which they have control. But, even in the home part, many things are entrusted to the superintendence of the master, such as the hiring of the crew, the procuring equipments, &c., for the voyage. The master may also let the ship on charter party, and take shipments in freight; he may receive goods on board, and sign bills of lading for the same (*i*). There are such usual incidents of his official character, that notice of a positive prohibition would seem indispensable, in order to affect third parties,

(*h*) The master of a ship has no authority to sign bills of lading for goods not received on board, and persons taking bills of lading from him have notice that his authority is limited to giving bills of lading for goods actually received. *Grant* v. *Norway*, 20 L. J., C. P., 93.

(*i*) *Duncan* v. *Benson*, 18 L. J., Exch., 169.

in case he had not received from his employer authority to do these acts (*k*). Note, however, that the master of a ship cannot bind the registered owner, if he be not also the real owner from whom he derives his authority (*l*). All depends upon the contract by which the master is appointed, the fact of registry goes for nothing.

We have seen above, that a master may, in case of illness, or for other good cause, delegate his authority (*m*).

Masters of ships may contract as agents for the charterers under a charter party as well as for the shipowner (*n*).

An *Auctioneer* has authority to bind both the seller and purchaser by the memorandum of sale and purchase (*o*). But in a sale of real estate, he has authority to receive only the deposit, and cannot discharge a purchaser by a receipt for the whole purchase-money, this being beyond the scope of his authority (*p*). He may prescribe the rules of bidding and the time of sale; and his verbal de-

(*k*) But the owner will not be bound, if he signs bills of lading for goods he has not received. *Hubberty* v. *Ward*, 22 L. J., Exch., 113; Story, § 119.

(*l*) *Mitcheson* v. *Oliver*, 25 L. J., Q. B., 39. See *Frost* v. *Oliver*, 22 L. J., Q. B., 353.

(*m*) *Supra*, p. 19.

(*n*) *Marquand* v. *Banner*, 25 L. J., Q. B., 313.

(*o*) *Mynn* v. *Jolliffe*, 1 Moo. & Rob. 326.

(*p*) *Ireland* v. *Thompson*, 17 L. J., C. P., 247, *per* Maule, J.

clarations at the time of sale, if they do not contradict the particulars, are binding on the vendor (*q*). He may sue the purchaser in his own name, as being in some measure the contracting party (*r*). But if he contracts for the sale of an estate by his principal, which the latter had disposed of previously, he does not render his principal liable to the intended purchaser for a breach of contract, if the principal fails to complete the sale to the party that he has contracted with (*s*).

A *Broker* has an authority, as agent of both vendor and purchaser, to sign a contract made by him as agent (*t*). He may, if he has no limitation of price, bind his principal to any price at which he honestly buys or sells. Ordinarily, he may sell by sample or with warranty. The powers of brokers and factors have already come before our notice incidentally (*u*), so that it will hardly be necessary to say more on the subject at present. It must be remembered that in each particular branch of trade there is generally some peculiar usage, which will always be a guide in ascertaining the duties or powers of the person who acts as agent. We shall hereafter notice the powers given to

(*q*) *Powell* v. *Edmunds*, 12 East, 6.
(*r*) *Williams* v. *Millington*, 1 H. Bl. 81.
(*s*) *Tyrer* v. *King*, 2 C. & Kir. 149.
(*t*) *Henderson* v. *Barnewall*, 1 Y. & Jerv. 387.
(*u*) *Supra*, pp. 15, 17.

factors by the 6 Geo. 4, c. 94, and 5 & 6 Vict., c. 39 (*x*).

The *Manager of a Bank* is held out to the public as having authority to act according to the general usage and course of business of the bank, and his acts are accordingly binding on the bank with respect to all persons having no knowledge that he has not authority (*y*). There are many things which the manager of a bank is authorized to do in the course of his employment. He is the executive officer, through whom and by whom the whole monied transactions of the bank, in paying and receiving debts and discharging or transferring securities, are conducted. He has an incidental authority to indorse the negotiable securities held by the bank, to supply the wants, and promote the interests of the bank (*z*). He also possesses authority to draw cheques upon other banks, upon the deposits therein of the funds of his own bank. He, or rather his assistants, are bound to know the handwriting of the drawer of a cheque; and on his paying a forged cheque, the bank will be bound thereby, as also by the payment of a forged banker's draft.

(*x*) *Post*, p. 118.
(*y*) Story, §§ 114, 115.
(*z*) Story, § 114, and cases there cited. It may be noticed that the cases cited are American decisions; very few cases have appeared in our own Courts as to the duties of managers of banks.

He can also employ solicitors and sub-agents.

The manager of a bank, however, cannot make declarations binding on the bank, not within the scope of his ordinary duties. Thus a promise to pay a debt not really due, or an admission that forged bills are genuine, are not obligatory on the bank. The cashier or manager of a bank cannot, more than any other agent, bind the bank, unless he acts within the limit of his ordinary duties. Thus, he cannot render the bank liable by a declaration to a person, who was about to become indorsee of a note, on the note being offered for discount, that he will incur no risk by doing so (*a*).

The *registered public officer of a banking company* has not, by virtue of his office, any additional powers conferred upon him beyond those which are incidental to any action or suit brought by or against him.

Sharebrokers, in addition to the authorities which other agents possess, have certain powers which are given to them in consequence of the liabilities which they incur in accordance with the rules of the Stock Exchange, ofwhich they are members. These rules are, of course, very necessary for the proper conduct of their transactions, for, in their dealings with one another, the names of their prin-

(*a*) Story, § 115; *Bank of United States* v. *Dunn*, 6 Peters, R. 51; and see 8 Peters, R. 12.

cipals are seldom mentioned, and it is, of course, only reasonable that sharebrokers should be answerable, personally, for any contracts they may have made amongst themselves. However, they have their remedy over against their employers for any disbursements they have been required to make on their behalf. We shall occasionally have to make reference to the liabilities of sharebrokers in some of the cases which will come before us. A sharebroker is authorized to make good deficiences occasioned by the default of his principal (*b*). He is authorized to deliver back shares to the vendor which his principal, the purchaser, cannot pay for, and to pay the difference on a re-sale by the vendor by which a loss is sustained (*c*). A sharebroker is also authorized to make payments for his principal in accordance with the rules of the Stock Exchange, though he may have received no directions from his principal to make the payment (*d*). But they cannot make payments, which, although they are ordered to be made in certain cases by a committee of the exchange, are contrary to the principles of the common law as concerning the contract of sale and purchase generally (*e*).

(*b*) *Sutton* v. *Tatham*, 10 Ad. & E. 27 ; *Bayliffe* v. *Butterworth*, 17 L. J., Exch., 78 ; *Milwen* v. *Woods*, 17 L. J., Q. B., 200.
(*c*) *Pollock* v. *Stables*, 17 L. J., Q. B., 352.
(*d*) *Bayley* v. *Wilkins*, 18 L. J., C. P., 273.
(*e*) *Westropp* v. *Solomons*, 19 L. J., C. P., 1.

Sect. 6.

OF THE AUTHORITY GIVEN TO FACTORS BY THE FACTORS' ACT.

In addition to the power of entering into contracts of sale or purchase, there is a contract, which, by parliamentary enactment, factors are authorized to make binding on their employers, viz. to pledge their goods in certain cases. They were not by the common law authorized to do this, it not being in the usual and ordinary course of their employment (*f*). Many frauds would, however, take place, and much confusion would prevail, if this contract of pledge were not allowed; and third persons would be liable to lose the money, which they had been induced to advance on the strength of the factor having the possession of the goods and documents entrusted to him, the real ownership of which it would not be in their power to discover.

By the Act referred to, 6 Geo. 4, c. 94, amending 4 Geo. 4, c. 83, any persons entrusted for the purpose of sale with goods shall be deemed the true owners thereof, so as to entitle the consignee to a lien thereon, in respect of any advances made by him to such persons, if he has not notice at or

(*f*) *Paterson* v. *Tash*, Str. 1178; *De Boucheut* v. *Goldsmid*, 5 Ves. 211; *Newsom* v. *Thornton*, 6 East, 17, as to documents.

before the time of the advance or receipt, that such person is not the actual and *bonâ fide* owner of such goods; and such persons shall be taken, for the purposes of this act, to have been entrusted with the goods for the purpose of consignment, or of sale, unless the contrary be made to appear. All persons entrusted with (*g*), and in possession of, any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods are to be taken to be the true owners of the goods mentioned therein, so as to give effect to any contract by such persons for the disposition, deposit or pledge thereof, as a security for any advances on the faith of such documents; provided the other contracting parties shall not have notice by such documents, or otherwise, that such persons so entrusted are not the actual and *bonâ fide* owners of

(*g*) In the case of *Philips* v. *Huth*, 6 M. & W. 572, it became a question what was the entrusting a person with documents sufficient to enable a factor to pledge the same. "Principals can never be deemed to have entrusted the agents with a document which the agents obtain by breach of trust, against the intention of the principals and in violation of their duty towards them." When, therefore, a factor had obtained possession of a dock warrant, which was delivered to him, in consequence of the goods consigned by a bill of lading standing in his name, and pledged the dock warrant for advances beyond what he had a lien for, it was held, that he was not *entrusted with* the dock warrant so as to enable him to pledge it. *Hatfield* v. *Philips*, 9 M. & W. 647; 14 M. & W. 665; 12 Cl. & Fin. 343.

the goods deposited or pledged (*h*). If the deposit or pledge is made as a security for a pre-existing debt or demand, the person who takes the pledge or deposit, without notice, shall acquire the same right and interest as the person entrusted with the goods had. And by sect. 5, it shall be lawful for any persons to take any goods or any document on deposit, or pledge from any factors or agents, notwithstanding they shall have notice that the persons making such deposit or pledge are factors or agents; but, in such case, they shall acquire no further right, title or interest than was possessed by the factor or agent at the time of such deposit or pledge. By sect. 6 the right of the true owner of the goods to recover them from the factor or buyer, in certain cases, and on certain conditions, is declared.

By the 5 & 6 Vict. c. 39, passed in consequence of the last-mentioned Act having, in some measure, proved unsatisfactory, after reciting that Act, and that under it advances could not be safely made to persons known to have possession as agents only, and that the same protection should be given to advances on goods as to sales; and that owners, who would be bound by a contract of sale, should

(*h*) "This section was to operate in the case of a person who was dealing with an agent, not knowing him to be such, apparently as owner." Per Lord St. Leonards, *Navulshaw* v. *Brownrigg*, 2 Sim. N. S., 21 L. J., Ch., 908.

be bound by a contract of lien, and reciting that the Act did not protect exchange of securities, and had given rise to much litigation, it was enacted, "That any agent who should be entrusted with any goods should be deemed to be the owner thereof, so as to give validity to any contract or agreement by way of pledge, lien or security, as well for an original as for a continuing loan or advance, and should be good against the owner of such goods, notwithstanding the person who made such advances had notice that the person with whom the contract or agreement was made was only an agent." With regard to this enactment, Lord St. Leonards, in his judgment in *Navulshaw* v. *Brownrigg* (*i*), has said, "Under the 6 Geo. 4, you might purchase from a known agent, provided it was in the usual course of business, and that you did not know that the agent had not authority. These two things only were necessary to give validity to a sale by a known agent, and the late Act intended to put pledges upon exactly the same footing as purchases. There is this difference between the two Acts: the one Act says, you are safe in buying of a known agent in the ordinary course of business, if you are not aware that he is an agent; but the other merely recites that the pledge is in the ordinary course of business. It no longer makes

(*i*) 21 L. J., Ch., 908.

it a condition that the pledge should be, but assumes that it is, in the ordinary course of business, and if you do not know that he has not authority, you are perfectly safe" (*k*). By sect. 2, *bonâ fide* deposits in exchange are also protected. But it is provided that the Act shall be construed to give validity to such contracts and agreements only, and to protect only such loans, advances and exchanges as shall be made *bonâ fide* and without notice, that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malâ fide* in respect thereof, against the owner of such goods and merchandise; and nothing therein contained shall be construed to extend or protect any lien or pledge for, or in respect of, any antecedent debt owing from any agent to any person, with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid in deviating from any express order or authority received from the owner, but that for the purpose of protecting all *bonâ fide* loans, advances and exchanges, though made with notice of such agent not being owner, but without any notice of the agent acting without authority, and to no further or other intent or purpose, such contract or agreement shall be binding on the owner, and all other persons interested in such

(*k*) *Navulshaw* v. *Brownrigg*, 20 L. Times, 25; 21 L. J., Ch., 908.

goods. "You may, therefore, by this Act treat any agent whom you know to be so as owner in accepting of any pledge of goods from him, which you know to have been deposited or transmitted to him as agent, if you are acting *bonâ fide*, and have not notice that he is making the contract either *malâ fide*, or beyond his authority. It is assumed it will be in the ordinary course of business" (*l*). As to what will amount to notice, it must be an express prohibition to pledge, which must be declared to the party dealing with the agent. Circumstances, which do no more than raise a suspicion that the agent has not the right, will not suffice by way of notice. And, therefore, the words of Lord Tenterden in *Evans* v. *Trueman* (*m*), are not sufficiently strong on the subject (*n*). That is, the notice and knowledge must be more positive than he implies. It is also provided, that any bill of lading, India warrant, dock warrant, warehouse keepers' certificate, warrant or order for the delivery of goods, or any document used in business as proof of the possession or control of goods, or authorizing the

(*l*) *Navulshaw* v. *Brownrigg*, *ubi supra*.

(*m*) 1 Moo. & Rob. 10. "A person may have knowledge of a fact, either by direct communication or by being aware of circumstances which must lead a reasonable man applying his mind to them, and judging from them, to the conclusion that the fact is so. *Knowledge* acquired in either of these ways is, I think, enough to exclude a party from the benefit of the provisions of this statute (6 Geo. 4, c. 96): slight suspicion, I think, will not."

(*n*) *Navulshaw* v. *Brownrigg*, per Lord St. Leonards.

possessor thereof to transfer or receive the goods thereby represented, shall be taken to be a document of title within the meaning of the Act. An agent entrusted with documents of title shall be taken to be entrusted with the goods represented thereby, and contracts of pledge or lien upon such document shall be taken to be pledges and liens upon the goods to which the document relates. An agent shall be taken to be in possession of goods and documents, if they are held by some person for him, and on his behalf. Contracts of loan relating to goods and documents shall be valid, although they do not come into the possession of the person making the advance, until subsequently to the period of its being actually made. Any contract or agreement, whether made directly with the agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; a payment by money or negotiable instrument shall be taken to be an advance, and possession to be *primâ facie* evidence of entrusting. The civil responsibility of the agent for any breach of his instructions or duty is not diminished (*o*); and an agent making consignments or transfers contrary to the instructions of his principal is guilty of misdemeanour (*p*). Nothing contained in the Act is to prevent the owner from having the right

(*o*) Sect. 5. (*p*) Sect. 6.

to redeem goods or documents which have been pledged at any time before such goods have been sold, upon repayment of the amount of the lien thereon, or restoration of the securities in respect of which such lien may exist, and upon payment or satisfaction to such agent, if by him required, of any money in respect of which he is entitled to retain the goods, by way of lien as against such owner; or to prevent such owner from recovering of and from such person with whom any such goods or documents may have been pledged, or who shall have any lien thereon as aforesaid, any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting the amount of the lien of such person under such contract or agreement as aforesaid. There is a proviso, that in case of the bankruptcy of any such agent, the owner of the goods which shall have been so redeemed by such owner as aforesaid shall, in respect of the sum paid by him on account of such agent for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy, or in case the goods shall not be so redeemed, the owner shall be deemed a creditor of such agent for the value of the goods so pledged at the time of the pledge; and shall, if he shall think fit, be entitled in either of such cases to prove for or set-off the sum so paid, or the value of such goods, as the case may be.

But where there is a mutual understanding between the agent and the lender, and the deposit of the principal's goods is only a means of paying the latter a sum due from the agent, the transaction will not be upheld. Where a factor was an agent for two different parties, and was indebted with one to some other person, and, in order to enable himself to meet the demand, borrowed of his co-debtor 300*l.*, and deposited the goods of his other principal with him as a security for the amount, it was held that this was no pledge or loan of money, or deposit of goods, within the Factors' Acts, on the ground that it was a transaction not exclusively in his character of factor (*q*). Wherever goods have been consigned to a factor for the purpose of sale, unless there is some express notice from the principal that the factor has no right to pledge them, he may do so. Thus, where some pearls were consigned to some factors in England, who, at the time of the shipment accepted bills for the consignors to the amount of 2,446*l.*, and afterwards on security of the pearls obtained 2,000*l.* from their own London agents, who were aware that they were consigned to the factors for sale, it was held that there was no evidence of *mala fides*, and that the advances were rightfully made (*r*). "I

(*q*) *Learoyd* v. *Robinson*, 12 M. & W. 745.

(*r*) *Navulshaw* v. *Brownrigg*, 1 Sim., N. S. 573, and on appeal. See *supra*, the remarks of Lord St. Leonards on the Factors' Acts in this case.

believe I should be putting upon the Act of Parliament a construction totally different from that which the legislature intended it to receive, if I were to say that it meant to deal with two classes of deposits by the owners of goods with factors, namely, one a deposit of goods with authority to sell them; and, the other, a deposit of goods, with an authority to pledge them. I believe that it is a very rare transaction indeed for a merchant to consign goods to a factor, merely that he may pledge them"(*s*). In this case, therefore, it was decided, that the principal could not recover the proceeds of the pearls on the ground of fraud in the transaction; and that as the plaintiff might have a remedy at law, the bill must be dismissed. This decision has since been confirmed on appeal; and the judgment of Lord St. Leonards, on the case coming before him, may be looked upon as a sort of treatise on the two Acts by which pledges are authorized.

(*s*) Per Lord Cranworth, *Navulshaw* v. *Brownrigg*, 1 Sim., N. S. 573, and judgment of Lord St. Leonards; 20 Law Times, 25; 21 L. J., Ch., 908.

Sect. 7.

OF PAYMENTS TO AGENTS.

A payment to an agent is in law considered as a payment to the principal (*t*). But certain circumstances in connection with the payment must be attended to. The sum paid must be specifically declared to be in discharge of a debt due to the principal; and this is more especially necessary where any account is open between the person making the payment and the agent (*u*); or where the person making the payment holds a cheque or other security of the agent (*x*), the agent must, of course, be authorized to receive payment; and therefore, unless there be a particular allegation of authority for that purpose, it must be in the common course of the agent's employment that the payment is made. There is generally an implied authority to agents to receive payments, which are to be made in connection with any business they may have in hand. Thus clerks, shopmen and the like, may receive payment for goods sold by them in their employers' behalf. But it seems that the clerk of an agent is not authorized to receive payment on behalf of his master's prin-

(*t*) *Favenc* v. *Bennett*, 11 East, 38.
(*u*) *Bartlett* v. *Pentland*, 10 B. & C. 760.
(*x*) *Underwood* v. *Nicholls*, 25 L. J., C. P., 79.

cipal (*y*). Payments to masters of ships (*z*), factors (*a*), attornies (*b*), auctioneers (*c*), or other agents, relative to their respective employments, are valid. But a payment to an agent, in a matter foreign to his calling, will not discharge the debtor. Nor will payments made to a person who is employed to transact a person's general business, in any particular calling, always discharge the payer. A person, being a solicitor and general agent for another, is not, from that fact, authorized to receive payment for his principal (*d*). A payment of a sum of money, agreed to be lent, made by the lender to an attorney, who is employed to transact a loan, and acts as agent to both lender and borrower, will not be considered a payment to the principal, unless there is something to show that the attorney was authorized to receive payment (*e*). It would appear that expediency, and a wish to make persons cautious in their dealings, rather than principle, dictated these two last decisions, as there can be little doubt that the attorney, if acting in the usual course of his employment, would be authorized to receive pay-

(*y*) *Kaye* v. *Brett*, 19 L. J., Exch., 340.
(*z*) *Anderson* v. *Hellier*, 21 L. J., C. P., 151.
(*a*) *Baring* v. *Corrie*, 2 B. & Ald. 137.
(*b*) *Colman* v. *Orton*, 10 L. J., Ch., 18.
(*c*) *Mynn* v. *Jolliffe*, 1 Moo. & Rob. 326, but only of deposit, not of whole purchase-money.
(*d*) *Colman* v. *Orton*, 10 L. J., Ch., 18.
(*e*) *Wilkinson* v. *Candleish*, 19 L. J., Exch., 166.

ment. It is incumbent on parties making payments to one whom they know to be the agents of another, as well as themselves, to be circumspect. Thus, where an attorney was employed as agent for two parties, the grantor and grantee of an annuity, and was entrusted by the grantor with money to repurchase the annuity, which money he appropriated, but nevertheless obtained from the grantee a release of the annuity, and an acknowledgment that the repurchase money had been paid; the person who made the payment was held not to be discharged thereby; for that, under the circumstances of the case, and especially from the fact of the receiver of payment being agent for both parties, he ought to have been more circumspect as to whom he made payment (*f*). This case is one which must be of daily occurrence in the practice of attornies, and shows the danger of trusting persons in whom the employer has not just grounds for placing the most implicit confidence.

A person employed to sell an estate is not authorized to receive payment for it, "since it is to the interest of the vendor that he should receive payment himself (*g*),—a somewhat primitive reason, as it clearly might be to the interest of the vendor that another should receive payment, provided he

(*f*) *Vandaleur* v. *Blagrave*, 17 L. J., Ch., 45.
(*g*) *Mynn* v. *Jolliffe*, 1 Moo. & Rob. 326.

ultimately gets what is due to him. But where the circumstances of a sale by an agent are such, that it is in the alternative for the agent, either to receive payment from a third person, or to give him credit on behalf of his principal, he may do that which is most to his principal's advantage, and accordingly may receive payment himself. Thus a master of a ship which had been wrecked, on disposing of it, for the benefit of the owner, at a distant port, may receive payment of the purchase-money (*h*). A payment, to be valid against the principal, must be made in such a manner as is usual in the course of trade, unless it may be inferred that the agent has authority to receive it in a different manner (*i*). On this ground it is probable that the decision, that an agent cannot receive his own cheque in payment, so as to discharge a party who had cashed it for his accommodation, may be sustained (*k*). *A fortiori*, the express direction of the principal, that a payment may be made in a particular manner, will make any payment in that manner a valid discharge (*l*). Wherever money is due on any security, any person making a payment thereof should ascertain whether

(*h*) *Ireland* v. *Thompson*, 17 L. J., C. P., 246.
(*i*) *Thorold* v. *Smith*, 11 Mod. 711; *Stewart* v. *Aberdeen*, 4 Mee. & Wels. 211.
(*k*) *Underwood* v. *Nicholls*, 25 L. J., C. P., 79.
(*l*) *Barker* v. *Greenwood*, 2 Young & Coll. 419.

the security is in the possession of him to whom the payment is made; for otherwise, it is said, he will not be discharged unless the money reach the principal, not even though the agent to whom the payment is made should have been usually employed to receive money; for his non-production of the security rebuts the implication of authority arising from his employment (*m*).

Where an agent has received a sum of money from a third person, which the latter is entitled to recall, if he has not paid the amount over to his principal, he is liable to refund upon demand being made (*n*). And the mere passing money in account, making rests without any new credit given, fresh bills accepted, or further sum advanced to the principal by the agent in consequence, is not equivalent to a payment over. Where an insurance broker, having effected a policy of insurance for his principal, on a loss taking place received the amount thereof from the underwriters, passed the same in account, and gave credit to his principal for it; on the underwriter discovering the loss to be foul, it was held that the broker was bound to refund the money (*o*). But if the agent has given a new credit to his principal since the payment, or

(*m*) Smith, Merc. Law, p. 127; *Hen* v. *Caesby*, 1 Cha. Ca. 93.
(*n*) *Cox* v. *Prentice*, 3 M. & Sel. 344; Story, § 300.
(*o*) *Buller* v. *Harrison*, 2 Cowp. 565.

has handed the money over without notice not to do so, he cannot be called upon to refund it, and the principal must be the party sued, it being a rule of law that the right of a principal to any money or property shall not be called in question in an action against the agent (*p*); and that the intermediate hand shall not be responsible, unless caught with the money in his possession (*q*). Thus, when the plaintiff, an intending purchaser of an estate, paid the defendant, the agent of the vendor, a sum of money by way of deposit; the contract was afterwards rescinded, but previous thereto the defendant had paid his principal part of the deposit, and held the rest by agreement with him; the plaintiff, on bringing an action for the deposit against the agent, was nonsuited on the above ground (*r*).

Wherever a payment to an agent will be good as against the principal, a tender to him will be good also (*s*).

If an agent illegally gets money into his possession, knowing that neither he nor his principal have any right to it, his paying it over to his principal will not discharge him from liability to refund it, if required (*t*).

(*p*) *Sadler* v. *Evans*, 4 Burr. 1985; *Hardman* v. *Willcock*, 9 Bing. 382, n.; Story, § 217.
(*q*) Addison on Contracts, vol. ii. p. 7.
(*r*) *Hurley* v. *Baker*, 16 L. J., Exch., 273.
(*s*) *Goodland* v. *Blewth*, 1 Camp. 477.
(*t*) *Miller* v. *Aris*, Selw. N. P. 93.

If by fraud or misrepresentation an agent has induced a third person to pay money to him, which he hands over to his principal, he will still be answerable for the amount; and he cannot plead his agency, and the transfer of the money to his employer, in bar of the right of the payer to recover it (*u*). The same is the case where a payment has been made to an agent under protest, and in such a case he cannot discharge himself by paying it over to his principal (*x*).

No privity of contract exists between an agent and the person for whose use money is paid to him by his principal; and consequently no action can be maintained by such third person, unless an assent has been expressed or implied by the agent to pay the money according to the directions he has received (*y*).

If a payment has been made to an agent, he becomes personally liable to his principal for the amount received, and the principal, to whom the money is due, will not be permitted to lose by the conduct of a substitute appointed by the agent, if from any act of his the money does not come to the principal's hands (*z*).

(*u*) *Smith* v. *Sleap*, 12 M. & W. 588.
(*x*) *Wakefield* v. *Newbon*, 6 Q. B. 280; *Parker* v. *Bristol and Exeter Railway Company*, 6 Exch. 702.
(*y*) *Cobb* v. *Beak*, 6 Q. B. 931.
(*z*) *Makery* v. *Ramsage*, 9 Cl. & Fin. 818.

CHAPTER V.

OF THE LIABILITY OF PRINCIPALS ON CONTRACTS.

The employment of agents chiefly takes place in the negotiations and transactions of commerce; and questions as to the liability of the principal or the agent most frequently arise upon the terms of contracts entered into by agents on behalf of their principals.

We will now proceed to consider the liabilities of principals on contracts.

The principal has hitherto been considered as the only person liable, as indeed he is, if the agent having authority to contract for him, in so doing keeps within the scope of his authority. For no rule of law is better ascertained or stands upon a stronger foundation than this, that where an agent names his principal, the principal is responsible and not the agent (*a*). An agent may be appointed either by a formal instrument, by a verbal authority, by mere transactions passing between himself

(*a*) *Ex parte Hartop*, 12 Ves. 352.

and his principal in the way of business, or even by tacit acquiescence. Having been appointed he may declare his character, name his principal, and state all the circumstances relative to his employment and his instructions, and then enter into all such contracts as are usually made by those similarly employed in the course of trade; he may also do any act, or make any agreement which is called for by any extraordinary emergency. If these conditions are complied with, all his contracts and acts will be binding on his principal, who alone will be responsible for their fulfilment. The principal will be responsible, even if the agent exceed the limit of his apparent authority, if it can afterwards be shown that the authority really accorded to him comprises such excess. The principal will also be liable, if the agent exceeds the authority given to him, if he subsequently ratifies the acts of his agent.

In the above cases the principal alone will be liable on a contract.

CHAPTER VI.

OF THE LIABILITY OF AGENTS ON CONTRACTS.

SECT. I.

CONTRACTS IN WRITING.

AN agent may, and frequently does, make himself personally liable on contracts entered into on behalf of his principal. In the case of an agent signing a deed in words, which do not clearly show that he means to bind his principal by the instrument, even though he has the requisite authority under seal, the principal will not be bound. In such a case, the agent will be held personally and exclusively liable, *ut res magis valeat quam pereat*, and, moreover, as the person contracted with, being liable on such an instrument, must have his remedy against some person, that person will be the agent. And if there are any descriptive words declaring the character of the agent, and the name of the principal, they will, in contracts of this description, be treated as mere surplusage. Covenants by deed must be expressed to be made by the principal himself, and if the agent has authority to execute the instrument, the principal will be bound. But if they are expressed to be made by the agent,

the disclosure of his principal on the face of the instrument avails him nothing, and he will be himself exclusively responsible. Thus, where a man covenanted for himself and his heirs for and on behalf of A. B. to do a certain act; it was held that he, and not his principal A. B., was answerable for its performance (*c*).

An agent will make himself responsible on agreements or undertakings in writing, *not under seal*, if he does not disclose his principal, but enters into the contract in his own name, even though he is known to be an agent at the time of entering into the contract (*d*). And, if the agent should have entered into the contract under an authority from his principal, if he is sought to be charged, he cannot, if the contract is in writing, introduce oral evidence to show that his principal, and not himself, is the contracting party, and thus discharge himself from liability (*e*). But, on the other hand, although an agent, by writing, contracts as agent, and subsequently discloses his principal, if he does not do so at the time of entering into the contract, the party with whom the contract is made may give evidence of the usage of trade, to show that in the contract the agent is personally liable (*f*). In the common form of policies of

(*c*) *Appleton* v. *Binks*, 5 East, 148.
(*d*) *Jones* v. *Littledale*, 6 Ad. & E. 186.
(*e*) *Higgins* v. *Senior*, 8 M. & W. 844.
(*f*) *Humfrey* v. *Dale*, 28 Law Times, Q. B., 285.

insurance, the agent, in his own name, causes himself to be insured for his principal, or for whom it may concern. In such a case he is deemed an immediate, though not the sole contracting party, and the underwriter and himself become reciprocally parties to and obliged by the policy (*g*). Where an auctioneer after a sale signed an agreement with the purchaser, "I, A. B., do hereby acknowledge to have this day sold, and I, the undersigned C. C., do acknowledge this day to have purchased," the auctioneer was held to have rendered himself personally responsible for the fulfilment of the contract (*h*). Where an agent sold some shares for another person in his own name, and his clerk entered the sale in his sale book, he was held liable on the contract (*i*). No evidence will be admitted for the purpose of discharging an agent in such a case (*j*). In written contracts entered into by agents, it is often very difficult to determine whether the agent is or is not bound as well as the principal. Justice Story seems to be of opinion that the fact of the principal being indirectly liable on the contract does not exonerate the agent from all personal responsibility. Nothing is more common than for a contract to be made, by which the agent is personally bound, and which

(*g*) Story, § 272.
(*h*) *Gray* v. *Gutteridge*, 1 M. & R. 618.
(*i*) *Magee* v. *Atkinson*, 2 M. & W. 442.
(*j*) *Higgins* v. *Senior*, 8 M. & W. 844.

is *ex consequenti* binding on the principal also, although the latter is not a direct and immediate party to the instrument. The correct doctrine would seem to be that, where the agent is a direct party to a written instrument and the principal is not, so that the latter is not *ex directo* suable thereon, there the agent, although he describes himself as agent, is suable upon the covenants and agreements contained therein, as on his own personal contract (*k*).

Some of the cases appear very irreconcileable. In one case a man covenanted for himself, his heirs, &c., for and on behalf of J. S. to do a certain act, and it was held that he, and not J. S., was answerable for its performance (*l*). Where, by a written agreement A., on the part of B., agreed to let, and the plaintiff agreed to take a certain messuage and premises at a yearly rent payable to the defendant for the use of A., and licence for certain acts was to be given by the defendant on the part of A., and the plaintiff was to execute a lease when called upon by the defendant. The agreement was signed by the defendant in his own name. An action on the agreement was brought against the defendant, and he was held to be personally liable (*m*). "The contracting parties

(*k*) Parke, B., in *Higgins* v. *Senior*, Story, § 278; 8 M. & W. 844.
(*l*) *Appleton* v. *Binks*, 5 East, 148.
(*m*) *Tanner* v. *Christian*, 24 L. J., Q. B., 91; *Norton* v. *Herron*, Ry. & M. 229, is a precisely similar case.

are the defendant of the one part and the plaintiff of the other part. To be sure the words, 'for and on behalf, &c.,' were added after the defendant's name; but still the defendant contracts. In *Lewis* v. *Nicholson* (*n*), the defendants were not themselves to do the act contracted for, and, therefore, no personal liability was incurred by them." It was considered a point of some importance that the rent was reserved and payable to defendant (*o*). By a charter-party between the plaintiff and defendants, a ship was chartered by the defendants to the plaintiff for a certain voyage. No mention was made of any other name than the defendant's in the instrument; but at the foot of the charter-party were the words, "By authority of and as agents for A.," and the signature of the defendants followed. It was held that the defendants were personally liable for a breach of the charter-party (*p*). "Many cases have decided that it is not sufficient to free the parties to a contract from personal liability that they state in the contract that they enter into it as agents for another person; but that the whole instrument must be looked to, in order to see whether the contract is made by them as principals or agents." The words of the contract

(*n*) 21 L. J., Q. B., 311. See *post*, p. 144.
(*o*) Per Lord Campbell and Coleridge, J., *Tanner* v. *Christian*, 24 L. J., Q. B., 94.
(*p*) *Lennard* v. *Robinson*, 20 L. J., Q. B., 275.

were held extremely strong to show that the contract was intended to bind the defendants personally. In the above cases the fact of the agency, although alluded to, does not seem to have been so expressed on the face of the instrument as to lead to the supposition that the third party mainly relied on the credit of principal, but rather, on a fair construction of the words of the instrument, on that of the agent. If, in addition, the agent representing himself to be the principal, the party seeking to charge the agent's employer has debited the agent as his debtor in his books, the latter, of course, will be the only person he can charge (*q*). But in written instruments, a declaration of the character in which the agent signs, and of the person in whose behalf he does so, in such a manner as to show that the principal's credit is chiefly relied on, will be sufficient to shift the responsibility from the agent to the principal, so that where Lavender, an auctioneer, entered into an agreement on behalf of S. R. and signed it in his own name, but at the foot of the agreement were the words, "I hereby sanction the agreement and approve of Charles Lavender, having entered into it on my behalf:" it was held that Lavender was not responsible thereon (*r*). On the wording and signing of this instrument, it would

(*q*) *Pennell* v. *Alexander*, 23 L. J., Q. B., 171.
(*r*) *Spittle* v. *Lavender*, 2 Brod. & Bing. 152.

appear that Lavender would have been responsible; and it may be questioned how far the contemplation of a subsequent approval by the principal, as shown by the words quoted, ought to have discharged the agent.

Again, where an agent undertook (on behalf of his principals) to pay a sum of money, and it appeared from the attendant circumstances that the undertaking was given by him in the course of his employment as agent, he was held not to be liable upon the contract (*s*). Where goods were consigned to a person "for the London Gas Company, or to his assignees, he or they paying freight for the goods," which he accordingly promised to pay, it was held that, as he appeared on the face of the bill of lading to be the agent of the company, it must be taken that the promise was made by him in his character of agent, and that it was not binding upon him personally (*t*).

A proposition is made by Mr. Smith, in his "Leading Cases," vol. ii. p. 223 *b*, to this effect:— "If a person state himself to be an agent, but have really no principal, he is in law himself the principal." In a case recently decided, where one Hutchinson entered into a contract in writing, purporting to be made between the plaintiff and

(*s*) *Dounman* v. *Williams*, 7 Q. B. 109.
(*t*) *Amos* v. *Temperley*, 8 M. & W. 805.

T. A. Barnes, and signed it "R. Hutchinson, for T. A. Barnes," and it was proved that Barnes had given Hutchinson no authority to enter into the contract, on the plaintiff seeking to charge Hutchinson on the contract, it was held that he could not be treated as a party to the instrument so as to be sued upon it, unless shown to be the real principal (*u*). This case would seem to contradict Mr. Smith's proposition. In another case, an action was brought on an undertaking of the defendants, the material words of which were,—"We hereby, on behalf of the assignees, consent," &c. It appeared that the defendants gave the undertaking without any authority from the principals (the assignees). It was held, that they were not personally liable on the undertaking (*x*). Lord Campbell, in his judgment, said:—"It has been reported that Bayley, B., laid down the general rule, that where an agent makes a contract in the name of his principal, and it turns out that the principal is not liable, owing to want of authority in the agent to make such contract, the agent himself is personally liable. I must dissent from that doctrine. I think it must be confined to cases where the party professing to give the undertaking

(*u*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; 18 L. J., Q. B., 275.

(*x*) *Nicholson* v. *Lewis*, 21 L. J., Q. B., 311. See also *Tanner* v. *Christian*, 24 L. J., Q. B., 91; and *Carr* v. *Jackson*, L. J., Exch., 346.

could undertake. In *Jenkins* v. *Hutchinson* it was held, that a party who executes an instrument in the name of, and expressly as agent for, another, cannot be treated as a party to the instrument, so as to be sued upon it, unless he be shown to be the real principal. I go further and say, that when a party clearly contracts in the name of, and as agent for another, he cannot be sued upon the contract. If he has been guilty of fraud he may be sued in an action for the deceit, or perhaps he may be sued upon the implied undertaking that he had authority." A. believing himself to be the agent of G. for letting a farm, entered into an agreement with B. to let him the farm on a lease, and signed as agent of A. B., believing him duly authorized, entered on the farm. G. then refused to grant a lease, denying that A. had authority to bind him to do so. B. then filed a bill for specific performance against G., which was dismissed, on the ground that A. had no authority to bind G. as his agent. It was held that A. was liable to B. on the implied warranty that he had authority, and that B. could recover from him the money laid out on the farm and the costs of the chancery suit. Lord Campbell in this case said: "The notion of suing the agent as principal in such a case I always thought absurd" (*x*). These case may be con-

(*x*) *Collen* v. *Wright*, 28 Law Times, Q. B., 267.

sidered as deciding the questions which have arisen on the point, and are in opposition to what has been laid down by Justice Story, who says,—" Wherever any party undertakes to do any act as the agent of another, if he does not possess any authority from the principal, he will be personally responsible therefore to the person with whom he is dealing for or on account of his principal. He proceeds to doubt the authority of *Polhill* v. *Walter* (*y*), in which it was held that a party who acted upon the authority of a forged instrument, believing it to be genuine, was not responsible on the contract. The case of *Nicholson* v. *Lewis* shows that this decision was correct. The conclusion there arrived at seems just and reasonable, for, no doubt, a jury would, in such a case, give ample damages to the party aggrieved.

The result of recent decisions would seem to establish that the views entertained by Justice Story and Mr. Smith have not, on due consideration, received the approval of the judicial bench; and it would appear that, in the case of written contracts entered into by agents, the rule is, that the agent can be held liable as well as the principal only in the case in which he signs his name as agent and does not disclose his principal, in which case, *if he had authority to charge his principal,*

(*y*) 3 B. & Adol. 114; Story, § 264, n.

the third party may resort to any evidence he can obtain to charge the principal, and the principal will be liable. If the agent *had no such authority*, the principal will be discharged from the contract, as also the agent; but the latter will be liable to an action for any damage resulting from the non-fulfilment of the contract, or on the implied warranty that he had authority.

Bills of exchange and promissory notes stand upon a somewhat different footing from other written contracts. There appears to be this distinction between the two,—that bills, or notes, can never strictly be said to be for the benefit of a principal whose agent signs them; for, although the principal has received value for it, a negotiable instrument goes forth to the world merely as an obligation to pay a certain sum of money; whereas, in the case of a written contract, the mutual obligation generally appears on the face of it. It could not be asserted by a person, who got the possession of a bill, or note, that the principal, whose agent had signed it without disclosing his name, was the party for whose benefit the contract was entered into, and on the principle, *qui sentit commodum sentire debet et onus*, that he was chargeable on the instrument. Accordingly, there appears to be no case in which, if credit on a bill or note has been given exclusively, in the first instance, to an

agent who does not disclose his principal, the party holding the note has had the election to charge the principal on discovering who he is (*z*). And, therefore, where a bill of exchange, or promissory note or other negotiable instrument is signed by an agent in his own name, without any qualification of his liability, he will be personally responsible thereon, although he has himself no interest in the transaction, and it was in the knowledge of the person whom he seeks to charge that he was not a party interested.

Where a bill was drawn on the cashier of a company on account of the company, and the cashier accepted it in his own name, he was held personally liable on his acceptance (*a*). Justice Story expresses his doubts whether this principle of the personal liability of the agent was not carried too far in this case; but in more recent English decisions the principle has been carried quite as far (*b*). Thus, where a bill of exchange, purporting to be for value "received in machinery supplied to the Mining Company" was addressed to the defendant, who accepted the same, thus—"Accepted for the Company, A. B., purser:" it was held that

(*z*) *Lindus* v. *Bradwell*, 5 Com. B. 583; 17 L. J., C P., 121.
(*a*) *Thomas* v. *Bishop*, 2 Str. 955; and see *Jenkins* v. *Morris*, 16 Mee. & W. 877.
(*b*) Story, § 269, n.; *Marc* v. *Charles*, 25 L. J., Q. B., 119.

defendant was personally liable. Lord Campbell said,—"This case falls within the principle of *Thomas* v. *Bishop*, which may have been doubted on the other side of the Atlantic, but has always been looked upon as good law here" (*c*). But it was considered, that on an acceptance by a purser of a company, under similar circumstances, the words "*per proc.*" relieved him from responsibility (*c*).

If an agent who is employed to purchase bills for his principal should have them made payable to himself, and should then indorse and remit them to his principal, he will be liable to the principal, as well as to third parties as indorsee (*d*). In these cases, from the form of the transaction, the agent has made himself a direct party to the contract, and his liability is precisely the same as that of any other person who draws, accepts or indorses a bill or note.

But a bill of exchange or promissory note may be signed, drawn, indorsed or accepted on behalf of another person, whose name appears on the face of the instrument without making the party signing personally responsible thereon. And a person may sign a note of hand for himself and three others, and if it appears that he was the agent for

(*c*) *Nicholls* v. *Diamond*, 23 L. J., Exch., 1; see also *Owen* v. *Van Uster*, 10 C. B. 313; 20 L. J., C. P., 61.
(*d*) Story, § 269; *Goupy* v. *Harden*, 7 Taunt. 159.

these three, the note will be binding upon all four, and all must be made defendants in an action brought upon the instrument (*e*).

If credit on a bill or note has been given to a principal whose name does not appear, from the belief that he has authorized the agent to accept, indorse or sign it in the manner and form adopted, and it should be proved that such authority was given by the principal, he will be held liable on the contract, and oral evidence may be resorted to in order to charge him. But even in such a case the agent would also be personally liable from the terms of the contract.

Sect. 2.

CONTRACTS GENERALLY.

In cases where the contract is not, as well as in those in which it is, in writing, the agent may make himself personally responsible by not disclosing the fact of his agency, and thereby leading the person he contracts with to suppose him to be the contracting party. The main question in all contracts entered into between agents and third parties will be, to whom is credit given by the third party ? Is it to the principal or to the agent ? In the case we

(*e*) *Ex parte Buckley*, 14 M. & W. 469.

have just mentioned, it is clear that credit has been exclusively given to the agent. Therefore, if a factor buys goods in his own name, and treats with the other party, as if he were himself the principal, he will be liable to the seller for the fulfilment of the contract (*f*). Again, if the agent discloses the fact of his agency, but does not make known the name of his principal, he will be himself personally liable on the contract entered into under such circumstances. Thus, where an agent purchases goods for his principal, declaring that he does so as agent, but not informing the other party of the name of his principal, he will be liable for the price of the goods. Where an auctioneer sells shares at a public auction, without disclosing the name of the owner of the shares, he makes himself personally responsible for the fulfilment of the contract of sale (*g*). In the above cases exclusive credit is given to the agent. Notwithstanding an agent may disclose both the fact of his agency and the name of his principal, if he expressly pledges his own credit, and voluntarily undertakes the fulfilment of the contract, he will make himself personally responsible. Thus, if a person declare in a verbal contract that it was made for a principal, at the same time naming him, but should also give

(*f*) Story, § 266; see *Owen* v. *Gooch*, 2 Esp. 567.
(*g*) *Franklyn* v. *Lamond*, 4 C. B. 637; 16 L. J., C. P., 221; *Henson* v. *Roberdean*, Peake, N. P. C. 163.

his own word for its fulfilment, he may be charged upon such his undertaking (*h*). The principle will, of course, apply with more force to written contracts, in which alone, indeed, the rule will, in ordinary practice, bear. One instance occurs with respect to oral contracts. A foreign merchant went with his agent to certain tradesmen, and bought goods in the name of the agent, it being known at the time that the merchant was the principal; it was held in this case that the credit of the agent was presumed to be exclusively relied on, and that he alone was liable on the contract (*i*). Indeed, Justice Story says the doctrine may be stated in a more general form, that where exclusive credit is given to an agent in any transaction for a known principal, there the party contracted with must abide by his election, and can charge only the agent (*k*).

Where an agent declares himself to be acting for a principal, where circumstances are such that, in the knowledge of the agent, he is not responsible, a strong presumption arises that he meant to pledge his own credit. The ground of this is, that, unless these persons were liable on the contracts made by

(*h*) *Scrace* v. *Whittington*, 2 B. & C. 11.

(*i*) *Paterson* v. *Gandasequi*, 15 East, 62; Story, § 289.

(*k*) Story, § 289; *Addison* v. *Gandasequi*, 4 Taunt. 573. But in this case the question seemed to be, who was the real principal; and *quære* as to the position stated, if the principal is not prejudiced by being held liable.

them, the other party would be left without a remedy. Thus, where public persons, as commissioners of roads, or overseers contracted with others for the performance of work, the supply of goods, &c., they were held to be personally liable to those with whom they had contracted, for there was no one else to whom recourse could be had (*l*). Such agents are left to their remedy over against the persons for whom they act, if they refuse to ratify their acts. Where a principal resides abroad, the whole credit is considered as subsisting between the immediate contracting parties in this country. The home factor will, therefore, be personally and also exclusively responsible upon a contract made by him for a foreign principal (*m*). If there is no responsible principal, an agent who contracts for a fictitious one will be personally liable (*n*). There is an exception to the rule above stated as to agents being liable where there is no principal to whom recourse could be had in the case of Government agents acting for the public; such agents will not be held liable on contracts made by them in their public capacity. In these cases it is evident that

(*l*) *Eaton* v. *Bell*, 5 B. & Ald. 34; *Myriel* v. *Hymensold*, Hard. 205; Story, §§ 283—286. But most of the cases there cited go to show that the parties mentioned to be agents were themselves the principals or *quasi* principals.

(*m*) *Houghton* v. *Williams*, 3 Bos. & Pull. 490; *Thomson* v. *Davenport*, 9 B. & C. 78; *Wilson* v. *Zulueta*, 19 L. J., Q. B., 49.

(*n*) *Child* v. *Morris*, 2 Brod. & Bing. 460; Story, § 280.

the person contracting with the agent relies on the credit of the Government (*o*). There is also an exception in the case of persons acting as agents for charitable institutions, as it is always understood that the funds of the institution are primarily liable for any goods supplied (*p*).

It appears to have been formerly held, that where an agent in entering into a contract exceeds his authority in such a manner as to render his principal irresponsible, he will render himself responsible. It was said to be essential that the excess should be of such a description that the principal could not be sued upon the contract; for, if the excess were in some matter of small importance, which could be settled between the principal and the agent, as this could prove no ground of defence on the part of the principal, so it could be no ground for seeking to charge the agent. It was held, that a broker, who had purchased an article of a different description from that which he was instructed by his principal to procure, insomuch that the latter was not answerable for the price, had committed an excess of authority, so as to render himself liable to an action either on the contract or for a loss sustained on a resale (*q*). And the fact of the

(*o*) *Gidley* v. *Lord Palmerston*, 2 Brod. & Bing. 275; *Macbeath* v. *Haldimand*, 1 T. R. 172.

(*p*) *Burls* v. *Smith*, 7 Bing. R. 705; Story, § 287.

(*q*) *East India Company* v. *Hensley*, 1 Esp. 111.

principal having been disclosed by him, did not discharge him from the liability. But it is difficult to see why an agent should be held responsible on the contract for an excess of authority, and yet should not be held responsible if he has no authority at all. And we have seen by the case of *Nicholson* v. *Lewis*, and also of *Collen* v. *Wright* (*r*), that in the latter event he cannot be sued on the contract, but is only liable for the *tort* or the implied warranty that he had authority. It is, therefore, probable that the case of *East India Company* v. *Hensley* would not be decided in the same manner now, unless it could be shown that credit was given to the broker in his character of broker. If an agent, although known to be such, should expressly warrant soundness, a good title, or any other fact respecting a commodity or estate sold by him for his principal, if the credit is clearly given to him upon such warranty he will be liable thereon. Indeed, if such warranty were made falsely and fraudulently and without authority, the agent would be personally liable thereon as a matter of *tort* or on the implied undertaking that he had authority to warrant (*s*).

(*r*) *Supra*, p. 145.
(*s*) *Nicholson* v. *Lewis*, 21 L. J., Q. B., 311; *Collen* v. *Wright*, 28 Law Times, Q. B., 267.

Sect. 3.

AS TO THIRD PARTY'S RIGHT OF ELECTION AS TO WHOM HE WILL SUE.

It has been stated above, that if an agent does not disclose the fact of his agency or the name of his principal, he is exclusively responsible on any contract entered into under such circumstance. But on the party contracted with discovering that the agent has a principal, he may, if he chooses, look to the principal for the fulfilment of the agreement. His right of election as to whom he will charge remains open until he knows who the principal is, and he is not presumed to have an intention to elect either exclusively until the names and credit of both are fairly before him (*t*). If a sum of money is due from an agent or his principal to a third person, such person may, notwithstanding he has debited the agent in the transaction in respect of which the money is due, claim payment of the principal when discovered. He may, in such a case, sue the agent on his personal contract, and the principal on the contract of his agent (*u*). Mr. Smith has put forward the two following clearly expressed propositions on the subject:—

(*t*) *Thomson* v. *Davenport*, 9 B. & C. 78; *Paterson* v. *Gandasequi*, 15 East, 62; 2 Smith's L. Cases, 220 *et seq.*

(*u*) *Ibid.*

1. Where A. contracts with B. without stating himself to be an agent, but does not name his principal, B. may, on discovering his principal, elect between them. 2. The rule is the same where he states himself to be an agent, but does not name his principal (*v*).

If there be a contract in writing, oral evidence will be admitted to show that the person making the contract was an agent, and that another person was the party really interested in the contract (*x*). The admission of such evidence is not contrary to the well-established rule of law, that written instruments shall not be varied or contradicted by parol, but is a carrying out of the principle that parol evidence may be admitted to explain the true terms of a contract. Such evidence does not deny that the contract is binding on those whom, on the face of it, it purports to bind; but shows that it is so on another, by reason that the act of the agent, in signing the agreement in pursuance of the authority, is in law the act of the principal. Thus, where an English merchant resident abroad bought and sold goods in the name of his principal, and the agent signed contracts for the principal in his own name, oral evidence was admitted to prove that the name of the agent was the

(*v*) 2 Smith's L. Cases, 223.

(*x*) *Wilson* v. *Hart*, 7 Taunt. 295; *Sutherland* v. *Pratt*, 13 L. J., Exch., 246.

adopted trading name of the merchant (*y*). And, where an agent bought and sold goods as his own, oral evidence was admitted on behalf of a party seeking to charge the principal, that the agent was only an agent (*z*).

If an agent contracts for another person, whose name he declares, but from whom he has no authority, oral evidence will be admitted for the purpose of establishing that he is himself the principal (*a*). Although there is some contradiction in an agent saying, I am the principal; there would be no contradiction in a Court of Law considering him as filling two characters, those of principal and agent (*b*). But if there is any real contradiction between the oral evidence offered and the written instrument, the oral evidence will be rejected. Where, accordingly, an agent sold shares in his own name, and his clerk entered the sale in his sale book, as being from his master, and afterwards altered his sale book, and sent a note to the buyer representing the sale as being from another person, evidence to show a custom to send in broker's notes without disclosing the principal's name was rejected, because "it would be evidence

(*y*) *Trueman* v. *Loder*, 11 Ad. & E. 595, remarked upon in *Humfrey* v. *Dale*, 28 L. Times, Q. B. 278.
(*z*) *Wilson* v. *Hart*, 7 Taunt. 265.
(*a*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; 18 L. J., Q. B., 275.
(*b*) *Schmalz* v. *Avery*, 20 L. J., C. B., 228.

to alter a written contract;" and, said Baron Alderson, "The custom offered to be proved was a custom to alter the common law of England" (*c*).

If a person, in dealing with an agent, chooses to take his chance of the principal's responsibility, and shows by his acts that he has no intention of looking to the agent, he makes his election, and cannot afterwards seek to make the agent responsible in the contract.

A *del credere* commission does not affect the personal liability of the agent as to third parties, but only regulates the settlement of accounts between himself and his principal (*d*). Nor will any private agreement between the principal and agent at all affect the rights of third parties against them (*e*).

It must be understood that in all cases, where a third person, having all the circumstances fairly before him, makes his election as to whom he will charge, the other is discharged, and he cannot turn round and sue the party discharged.

There is a qualification to the liability of a principal in cases where a third party has an election whether he shall be charged or not, which is this:—If there has been any *laches* on the part of the person seeking to charge the principal, so

(*c*) *Magee* v. *Atkinson*, 2 M. & W. 440.
(*d*) *Morris* v. *Cleasby*, 4 M. & S. 566.
(*e*) *Railton* v. *Hodgson*, 4 Taunt. 576; *Rich* v. *Coe*, Cowp. 636.

that an alteration is made in the state of the accounts between the principal and his agent, previous to the principal being sought to be charged, he will be exonerated from liability. Thus, if in the interval between the contract being entered into and the actual settlement, but after the time appointed for settlement, the principal has paid the agent for goods bought, and is sued by the vendor for the price, he will be discharged from liability, and the vendor will be considered to have chosen the agent as his debtor (*f*). Again, if the vendor takes a bill of the agent in payment, the principal will be discharged (*g*). If the time for payment, however, has not elapsed, the principal cannot, by settling with the agent, deprive the vendor of his right of election as to whom he will charge (*h*). In the case which decides this, four specific quantities of coffee were sold by Kymer, the plaintiff, to Kenyon and Co., the brokers of the defendant Suwercropp, upon the condition that they were to be paid for on delivery, and to be taken away within a month. Part of the coffee was delivered, first to the brokers and then to the defendant, who gave to the brokers a bill for 750*l.*, one month after date, for the coffee which had been received.

(*f*) *Kymer* v. *Suwercropp*, 1 Camp. 109.

(*g*) Story, § 419, unless he took the bill *conditionally*; *Kymer* v. *Suwercropp*, 1 Camp. 109.

(*h*) *S. C.*; *Heald and others* v. *Kenworthy*, 24 L. J., Exch., 76.

Kenyon and Co. did not pay for the coffee on delivery to them, so that Suwercropp had obtained the goods contrary to the contract. Kenyon and Co. soon after stopped payment. The plaintiffs then tendered the rest of the coffee to Suwercropp, and demanded payment of the *whole*, which was refused by Suwercropp, on the ground that he had already settled with his agents Kenyon and Co. for the part delivered. The plaintiff recovered, probably upon the ground that there had been collusion between the defendant and his agents, and that the defendant had obtained possession of the goods contrary to the contract. In *Smyth* v. *Anderson* (*i*), the case of *Kymer* v. *Suwercropp* was much noticed, and was thought by the learned judges to have been misunderstood, and was not considered as establishing the general principle that settlement by a principal with his agent previous to the time of credit expiring could in no case discharge the principal.

Kymer v. *Suwercropp* shows that the vendee is not discharged where there is evidently no kind of unfairness in his being made to pay, on the ground that he has not paid at all or in any manner; but it by no means establishes that there are no circumstances that can occur, except a payment after the day, which will make it unfair for the vendor to

(*i*) 18 L. J., C. P., 109.

recover against the vendee, and therefore discharge the latter. In the case of *Smyth* v. *Anderson*, it was held that a principal residing abroad, who was known to the vendors, who had *bonâ fide* paid his agent for goods bought by the latter on his account, could not be made to pay the price over again on some bills, given by the agents to the vendors in payment of their claims, having been dishonoured. The remittance to their agents by them from abroad of sufficient funds to enable the agent to meet the demand was a good and valid payment. But perhaps this case was decided mainly upon the ground of the vendors, by having accepted bills of the agent as a security, having made themselves parties to the transaction, as well as from the fact of the principal residing abroad; and it would probably be held, that where no bill is given by the agent, a payment to him by his principal living in the same country would not discharge the principal in case the agent became insolvent before the time of payment had arrived. Where parties are living in the same country, and no bill is given, there is no occasion for any remittance to put the broker in funds at the time when the payment is to become due. In such a case, if the vendee pays the broker before that time, and without the privity or knowledge of the vendor, it is easy to see why the vendor should not be entitled to avail himself of that as a

defence. Where plaintiffs sold goods to an agent of defendant, treating the agent as principal, and the defendant soon after paid the agent sufficient to enable him to pay for the goods: it was held that, in the absence of anything to show that the plaintiffs had influenced the defendants in their conduct in settling with their agent, the defendants were liable to the plaintiffs for the price of the goods (*k*). "If a man order goods, he is bound to see that his agent pays for them, and the giving of money to his agent does not amount to payment, unless the money be actually so applied." "If the principal is induced by the conduct of the seller to pay his own agent, on the faith that the agent will settle with the seller, in such a case the seller would be precluded from recovering, as it would be unjust for him to do so" (*l*). We may conclude, therefore, that, where both principal and agent reside in the same country, a vendor by taking bills of the agent in payment for goods sold on credit thereby discharges the principal, provided that at the time the bills were given sufficient funds of the principal were in the agent's hands. The principal will be equally discharged if he puts the agent in funds to meet the bill given by him subsequently to the sale for the purpose of discharging the debt. If, on

(*k*) *Heald* v. *Kenworthy*, 24 L. J., Exch., 76.
(*l*) Per Parke, B., *Heald* v. *Kenworthy*, 24 L. J., Exch., 77.

the other hand, the agent gives a bill, but has no funds of his principal in his hands, and does not receive any for the purpose of meeting the demand, the principal will be held liable. The giving of a bill by the principal to the agent will not discharge the former from his liability. If the agent does not give a bill, the principal will, under any circumstances, be liable until payment is made, unless he has been induced by the vendors to pay or otherwise settle with his own agent, and it would consequently be unjust to hold him liable. If any receipt given by a vendor to the agent induces the principal to deal differently with his agent on the supposition that a settlement has been come to, the principal will be discharged (*m*). If there has been any misrepresentation on the part of the vendor, so that the principal has paid money to his agent, he will be discharged from liability (*n*).

It is incumbent on a person seeking to charge a principal to show that the contract he seeks to enforce is the same that the agent had authority from the principal to enter into, or that the principal in a mistaken belief supposed himself to have adopted, if he has adopted it (*o*).

Payment by an agent will of course discharge the principal in a contract of purchase.

(*m*) *Wyatt* v. *Marquis of Hertford*, 3 East, 147.
(*n*) *Heald* v. *Kenworthy*, 24 L. J., Exch., 77.
(*o*) *Horsfall* v. *Fauntleroy*, 10 B.C. 755.

Sect. 4.

RATIFICATION BY THE PRINCIPAL, AND ITS EFFECT AS TO THIRD PERSONS.

Having previously considered the subject of ratification by a principal with reference to its being set up as a defence by the agent to any claim made upon him by his principal for a transgression of his instructions, it will be proper in this place to inquire in what manner a ratification by the principal affects his own liability as to third persons. We will premise, however, that a ratification may be made in the same manner, as to its form in this case, as it could with respect to the agent.

A ratification when fairly made will have the same effect as an original authority to bind the principal. Therefore, an action, whether on account of some contract or act of the agent, which, if authorized, would give to any one a right of action against the principal, may, if the contract or act be unauthorized, but subsequently ratified by the principal, be brought against the principal thereupon (*p*). Thus, if an agent sells goods on behalf of his principal, without his authority, and the principal subsequently ratifies the transaction, the purchaser may sue on the contract, if the goods

(*p*) *Maclean* v. *Dunn*, 1 M. & P. 761; Story, § 244.

are not delivered. Where two persons, being jointly interested in some oil, one of them sold it without the knowledge of the other, who, on being informed of the fact, refused to be bound by the sale; on an altercation taking place with the purchasers, the one who had dissented said,—"Well, then, the oil must be delivered;" it was held this amounted to a ratification, and was as good as a previous authority (*q*). On the other hand, in the following case the approval of a draft was not considered to be such a ratification as to confer an authority *ab initio*. A. carried on a negotiation for B., for the purchase of some property, who had full knowledge of the fact of his doing so. And, after some documents passing between the parties, a draft assignment was prepared, which recited that the contract was a joint purchase by A. and B. This was submitted to, and approved by B., who was willing at that time to adopt the contract, but subsequently he changed his mind. It was held that there was no evidence that B. had entered into the agreement, or that A. had acted as his agent, and that his approval of the draft containing the recital did not bind B. (*r*). "The principal is bound by the act which he has ratified, whether it be for his detriment or advan-

(*q*) *Soames* v. *Spencer*, 1 D. & R. 32.
(*r*) *Toligno* v. *Martin*, 22 L.J., Ch., 502.

tage, and whether it be founded on tort or contract, to the same extent, and with all the consequences which follow from the same act if done by previous authority" (*s*). If the contract ratified be one in writing, the subsequent ratification may be by parol; and such means of making the contract valid will not be deemed in contravention of the Statute of Frauds, but, under that statute, the ratification of the principal will be held to relate back to the time when the agent made the contract (*t*).

The adoption of the acts of a sub-agent, although he was not originally authorized to be appointed by the principal, will bind the latter in the same manner as if he had previously authorized the appointment, and had given to the original agent a power of substitution (*u*).

The right of the principal to ratify and adopt any contract, which does not involve the right of a third person, so as to bind himself, or to transfer to himself an obligation previously due to the agent, always exists: but he cannot always ratify the act of his agent, so as to raise a duty to himself from a third person. Thus, where a person gave notice on behalf of a landlord to a tenant to quit, without having any authority to do so at the

(*s*) *Wilson* v. *Tummon*, 6 Sc. N. R. 904, per Tindal, C. J.
(*t*) *Maclean* v. *Dunn*, 1 D. & R. 32; 4 Bing. 722; *Soames* v. *Spencer*, 1 D. & R. 32.
(*u*) *Blore* v. *Sutton*, 3 Meriv. 246.

time, the subsequent ratification of the act by the principal was held not to give validity to the notice (*x*).

The ratification must be of the whole or none, as we have seen with reference to its being pleaded as a defence by agents (*y*).

Where a principal ratifies the negligent or wrongful act of his agent, he becomes answerable for it as much as if he had originally commanded it (*z*). But any apparent assent or ratification on the part of the principal subsequent to the wrongful act of the agent, must, in order to bind him, be made with full knowledge that the agent had acted wrongfully (*a*).

(*x*) *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626.
(*y*) *Supra*, p. 65.
(*z*) *Bates* v. *Pilling*, 6 B. & C. 38; Story, § 456.
(*a*) *Freeman* v. *Rosher*, 18 L. J., Q. B., 341.

CHAPTER VII.

OF THE MANNER IN WHICH AN AGENT MAY BIND HIS PRINCIPAL.

THE consideration of the *manner* in which an agent may bind his principal, refers chiefly to the signature of written instruments; for, in unwritten contracts, the manner of entering into them is not generally so much to be considered as the extent of authority.

An agent may bind his principal by *deed*, but in that case it is essential that his appointment should be by deed; even if this is the case, in signing the deed he must mention his principal, and state that he signs as agent for him (*a*). The general rule in regard to instruments under seal is, that in order to bind the principal, and to make the contract his, the deed must purport on the face of it to be the contract of the principal, and his name must be inserted in it, and signed to it, and not merely the name of the agent, even though the latter be described as agent in the in-

(*a*) *Harrison* v. *Jackson*, 7 T. R. 209.

strument (*b*). If the name of the principal be properly stated in a deed as the grantor, and his seal and signature affixed thereto, the form of the words used in the execution and subscription of the deed by the agent will not be material. The best mode is to sign the name of the principal, A. B., and to add by his attorney, C. D.; but it will be sufficient if the signature be for "A. B.," the principal, "C. D." the agent (*c*). If these formalities are not complied with, the principal will not be bound by the instrument, but the agent will be himself personally responsible (*d*). If a principal covenants

(*b*) Story, § 147; *Hunter* v. *Parker*, 7 M. & W. 343, per Parke, B., for the instrument appointing the agent transfers no *interest*.

(*c*) Story, § 148; *Wilkes* v. *Back*, 2 East, 142.

(*d*) *Appleton* v. *Binks*, 5 East, 148. I cannot forbear transcribing the remarks of Mr. Taylor in his Law of Evidence, vol. ii. § 801 :—"In considering how and where the signatures rendered necessary by these acts may be affixed by procuration, attention must be paid to the language employed by the legislature in each particular case. In some cases, as, for instance, those which fall within the 7th section of the Statute of Frauds, the 2nd section of the Act relating to Merchant Seamen, the 7th, 17th and 62nd sections of the Voters' Registration Act, the 23rd section of the Act for regulating Metropolitan Public Carriages, the 1st, 5th and 6th sections of Lord Tenterden's Act, and the 14th and 28th sections of the Real Property Limitation Act, it seems to be clear that the signature of an agent, however appointed, will not suffice. Whether notices of chargeability or grounds of appeal against orders of removal may be signed by agents or attornies on behalf of parish officers, is a question not yet determined; though the better opinion seems to be that these documents must be personally signed. (*R.* v. *Worcester*, 5 Q. B. 508; *R.* v. *Surrey*, 5 Q. B. 506.) In other cases, though the paper may be signed by an agent, yet his authority to do so must be evidenced in writing. For instance, this is expressly required in the 1st and

in a deed, and the agent executes it in his own name, there is no contract binding on either party (*e*).

In signing any other written instrument not under seal, the same formalities must be observed; for, if the agent sign his own name, he will be the only person bound by the contract. The same rule prevails with respect to the signature of negotiable instruments, as bills of exchange, &c.; and an agent cannot discharge himself by proving that the agreement was made by him as agent for another (*f*). Evidence, for the purpose of discharging a person who has signed a written contract, will never be admitted in contradiction to the express words of the written instrument (*g*). There is one difference between the signature of sealed

3rd sections of the Statute of Frauds, and in the 131st section of 6 Geo. 4, c. 16. In other cases, again, the legislature, while it allows agents to sign documents, does not require them to act under any written authority. Thus, in cases falling within the 4th or 17th sections of the Statute of Frauds, the 40th section of the Real Property Limitation Act, the 5th section of the Act for the Amendment of the Law, and the 4th section of the Act of 41 Geo. 3, s. 23, respecting notices of appeal against poor-rates, an agent authorized merely by parol may sign the respective documents on behalf of his principal, and even though the agent has acted in the first instance without any authority whatever, yet, if the principal by subsequent conduct has recognized and adopted what he has done, this will be sufficient to satisfy the respective statutes. (*Maclean* v. *Dunn*, 4 Bing. 722; *Gosbell* v. *Archer*, 2 A. & E. 500, 507.)

(*e*) *Berkeley* v. *Hardy*, 8 D. & R. 102; 5 B. & C. 355.

(*f*) *Supra*, p. 148.

(*g*) *Thomson* v. *Davenport*, 2 Smith's L. Cases, 220, and cases there cited.

and unsealed instruments, that whereas, in the case of the former the appointment of the agent must be made, or his authority conferred by an instrument under seal, and of equal solemnity with the instrument by which the contract is made; in the latter, for the purpose of signing the name of the principal to an unsealed document, so as to bind him effectually, his authority may be given by parol.

If a person is verbally authorized by his principal to undertake the payment of debt due from him, his signing an agreement in writing to pay the debt will be binding on his principal (*h*). A written instrument may be in such a form, that it *per se* constitutes an agent, as well as a principal, for the completion of its object; in such a case, the acts or contracts of the agent appointed bind the principal, although they are entirely without his knowledge or permission (*i*).

As a general rule, it may be laid down, that in all written instruments, a contract, to be binding on the principal, must be made in the name of the principal, and signed by him through his agent; and that a contract, made by the agent in his own name, will be only binding upon himself.

But even in written contracts there are certain cases which are exceptions to the general rule, and

(*h*) *Downman* v. *Williams*, 7 Q. B. 103.
(*i*) *Jones* v. *Evans*, 19 L. J., Exch., 200.

in which, although an agent contracts in his own name, he will bind his principal. These are chiefly dependent on the usage of trade, and on the necessity for upholding contracts, which are frequently made in mercantile transactions, in which factors and other agents make contracts for their principals in writing in their own names. For the true understanding and intention of the appointment of an agent is, that the principal shall be enabled to sue and be sued on the contract, and there is a strong analogy to the jurisdiction exercised by Courts of Equity, in cases of assignment of *choses in action*, where the debtor is made directly answerable to the assignee, though he might not be so at law (*k*). Thus, on a contract made in writing by a factor, in his own name, for the sale or purchase of goods for his principal, the principal may be sued as if he were named in it (*l*). A broker, who, in his own name, by a policy insures for his principal C. D., or for whom it may concern, &c., binds his principal on the policy as well as himself (*m*). A bottomry bond, bill of lading, or charter-party, signed by the master of a ship in his own name, will ordinarily bind the owner of the ship (*n*). Even though the charter-party be under

(*k*) Story, §§ 154, 162.
(*l*) *Morris* v. *Cleasby*, 4 M. & Sel. 566.
(*m*) *Wolff* v. *Horncastle*, 1 Bos. & Pull. 323.
(*n*) Story, § 161.

seal; although the owner could not be sued directly on the charter-party, the covenants and obligations contained in it are binding on him, although the remedy against him would be different from what it is against the master (*o*).

And, in the case of instruments not under seal, and not strictly mercantile contracts, a liberal mode of construction is adopted, so as to best carry out the object and intent of the parties. Thus, where an agent wrote a letter, in which was contained,— "Your bill of charges in this matter, I undertake (on behalf of Messrs. Esdaile & Co.) to pay, and will arrange with you the time and mode." It was held, in the absence of any proof that the agent was thereby exceeding his authority, that the principals were the parties liable on the undertaking (*p*). Again, where on a sale by a corporation, the mayor, on behalf of himself and the rest of the burgesses and commonalty, agreed to fulfil their part of the contract, and signed his name "C. D., Mayor;" it was held, that the agreement was that of the corporation, and not that of the mayor personally (*q*). The same construction prevails where bills or notes are drawn, accepted or indorsed by agents. If it appears that it was the intention of

(*o*) Story, § 161.
(*p*) *Downman* v. *Williams*, 7 Q. B. 103.
(*q*) *Bowen* v. *Morris*, 2 Taunt. 374.

the agent to sign the bill for any purpose on behalf of his principal, and not on his own account, if he has authority for that purpose, the principal will be the only person liable on the bill or note, and the agent will be discharged from all liability (*r*). "If a bill be addressed to the master, and underwrote by the servant, there undoubtedly the servant would not be liable, but his acceptance would be the act of his master" (*s*).

Where an agent signed a note of hand, promising to pay a sum of money for four persons whom he named, and it appeared that he was their agent, and made the promise with their sanction and authority, it was held that all the four who made the promise through the medium of their agent were the parties liable in an action on the instrument (*t*). But the intention must be clearly expressed on the face of the instrument, or the principal will be discharged, and the agent bound exclusively (*u*).

We have now considered some of the principles, which relate to the *manner* in which an agent may

(*r*) Story, § 155; *Amos* v. *Temperley*, 8 M. & W. 805.

(*s*) *Per cur.*, *Thomas* v. *Bishop*, 2 Str. 255. *Sed quære*, according to subsequent cases, if the master be a body or company. *Mare* v. *Charles*, 25 L. J., Q. B., 119; *Nicholls* v. *Diamond*, 23 L. J., Exch., 1.

(*t*) *Ex parte Buckley*, 14 M. & W. 469.

(*u*) *Leadbitter* v. *Farrow*, 5 M. & S. 345; *Wilson* v. *Barthrop*, 2 M. & W. 863.

bind his principal, and these have referred chiefly to written instruments. In contracts verbally made, or in contracts implied from acts, the mode of making them must depend entirely on their own peculiar circumstances.

CHAPTER VIII.

DETERMINATION OF PRINCIPAL'S LIABILITY ON A CONTRACT.

It is hardly necessary to state, that in the greater number of instances in which any duty is to be performed, the liability of a principal continues until the completion of the business, in relation to which it exists; or again, where goods are sold, until the delivery of them in a proper condition to the purchaser. Questions sometimes arise as to the circumstances under which a payment by an agent determines the liability of the person who authorizes him to make the payment. In ordinary cases, where the agent has authority to pledge the credit of his principal, the latter remains responsible on any contract of purchase entered into, until the creditor has received actual payment, or, by taking the security of the agent, has shifted the responsibility to him. However, the payment by an agent of any money, if it is received by the party to whom the money is due as an absolute payment, will discharge the principal, whether he is known or unknown, and whether the payment is in the

usual course of business or not. If the creditor, with full knowledge of the circumstances, takes the note of the agent, the principal will be discharged; but if, at the time of his doing so, he is not aware that he might have received payment in cash, or have taken the security of the principal, the principal will remain liable (*a*). The question to be decided is generally one of fact, whether the note of the agent is received as a conditional or as an absolute payment, whether with the knowledge that there is a principal or not, and whether, if so much is known, exclusive credit is given to the principal or to the agent (*b*). If a principal's name is not disclosed by the agent, and, before its becoming known to the other contracting party, who accordingly debits the agent, the principal supplies the agent with money to liquidate the debt, but before his settling it he becomes insolvent, the principal will be discharged, and the creditor will be confined to the responsibility of the agent whom he first debited in the matter (*c*).

The settlement must be made in the ordinary course of business; so that a principal in a contract, where goods were agreed to be paid for on a particular day, cannot, before his liability on the

(*a*) *Strong* v. *Hart*, 6 B. & C. 160.
(*b*) Story, § 431; *Seymour* v. *Pychlau*, 1 B. & Ald. 14.
(*c*) *Thomson* v. *Davenport*, 9 B. & C. 78; *Kymer* v. *Suwercropp*, 1 Camp. 109.

contract has accrued, settle with his agent, and plead that payment in defence to an action brought against him by the creditor (*d*). If a vendor knows that a person, with whom he is dealing, is only acting as agent, and is aware who the real principal is, but chooses to give credit to the agent, he cannot afterwards sue the principal for payment of the debt (*e*). A vendor cannot have two concurrent debtors, when, through the disclosure of the principal he has a power of shifting the liability, and then elects to charge the one, the other is discharged (*f*).

Although as between the principal and third persons there may be a determination of the principal's liability, the right of the agent to recover from his principal any payments he has made is not thereby effected; and, if he has given security, being authorized to do so, he may substitute himself in the place of the creditor, and recover the amount of the security from his principal (*g*).

(*d*) *Paterson* v. *Gandasequi*, 15 East, 62; *Smout* v. *Ilbery*, 10 M. & W. 1.

(*e*) *Wilson* v. *Hart*, 7 Taunt. 295.

(*f*) *Wilson* v. *Hart*, 7 Taunt. 295; *Wyatt* v. *Marquis of Hertford*, 3 East, 147; Story, § 296.

(*g*) Story, § 432; *Seymour* v. *Pychlau*, 1 B. & Ald. 14; *Power* v. *Butcher*, 10 B. & C. 329.

CHAPTER IX.

OF THE LIABILITY OF THE PRINCIPAL AND AGENT FOR THE MISREPRESENTATION OF THE AGENT.

Sect. 1.

OF MISREPRESENTATION GENERALLY.

Misrepresentation or fraud has the effect of vitiating any contract, so far as the parties or privies to it are concerned, so that they may be bound thereby or not, at the option of the other contracting party. And the party guilty of such fraud will be also liable to an action on the case for the deceit. To produce these consequences, it is not absolutely essential that a false statement should be made, for a *suppressio veri* will have the effect of invalidating a contract as much as a *suggestio falsi* (*a*). Where the knowledge of any fact is peculiarly within reach of any person, it is immaterial whether he makes a false statement with full knowledge, or in ignorance of its being false. "It is equally false and fraudulent for a man to affirm

(*a*) Addison on Contracts, vol. i. p. 132.

his knowledge of that of which he knows nothing, as to aver that to be true which he knows is not true" (*b*).

But, if it is in the power of the person, to whom a misrepresentation has been made, to know as much of the matter, or even enough to put him on further inquiry, the maxim *caveat emptor* will apply, and the purchaser or other contracting party will be bound by the contract, and cannot take advantage of the false statement in any way (*c*). Thus, where a general warranty was given on a sale, defects which were apparent at the time of making the bargain, and were known to the purchaser, cannot be relied on as a subject of fraud and deceit (*d*). To warrant a thing, which may be perceived at sight, is not good.

A misrepresentation must amount to something more than a mere statement of opinion or judgment, it must be some positive affirmation or statement of a fact which is false, or a suppression of a fact, which ought to be in the knowledge of the party making the representation (*e*). It must, in some measure, be the foundation of the contract, or be made concerning something very material to

(*b*) *Schneider* v. *Heath*, 3 Camp. 508.
(*c*) *Attwood* v. *Small*, 6 Cl. & Fin. 338.
(*d*) *Margetson* v. *Wright*, 5 M. & P. 610; Addison, vol. i. p. 129.
(*e*) Addison, vol. i. p. 129.

the value of the subject-matter thereof, so that it may be inferred that the contract would never have been entered into if the false statement had not been made. Therefore, if a man represents his house to be in good repair, and there are a few tiles off the roof, or a pane of glass broken in a garret window, his doing so affords no evidence of *mala fides* (*f*).

Sect. 2.

MISREPRESENTATION OF AGENT AND ITS CONSEQUENCES TO THE PRINCIPAL.

Having considered a few of the general principles concerning misrepresentation, we will now consider some of the consequences of its being made by agents. If an agent, in dealing for his principal, commit any fraudulent act or breach of faith towards a third person, by which his principal would be benefited, no advantage will be permitted to be taken thereof by his principal. The consequence of holding the principal not liable in such a case for the agent's misrepresentation, would in many instances be to enable him to retain the

(*f*) Addison, vol. i. p. 130.

produce of a bargain fraudulently made (*g*). A contract, therefore, made under such circumstances may be rescinded by the party who has been deceived, and any money paid under it may be recovered from the principal. Nor will the rescinding of the contract be the only consequence which results to the principal from the agent's misrepresentation, for he will be held personally liable for any damages resulting to the party aggrieved from the same (*h*). And the reason of this is put by Lord Holt,—"Seeing somebody must be a loser by this deceit, it is more reasonable that he who employs and puts trust in the deceiver should be a loser than a stranger" (*i*).

An illustration of this principle will be found in a case, in which the grantor of an annuity entrusted a person, who was acting as his agent, with a sum of money in order to repurchase the annuity. This person, who acted also as agent for the other party, obtained a release of the annuity without paying any money for the same. He then died insolvent. On an action being brought by the grantee against the grantor of the annuity for the amount of the

(*g*) *Wright* v. *Crookes*, 1 Sc. N. R. 700.

(*h*) If one employ an agent to make a contract, and that agent in making it knowingly commit a fraud, though the principal be perfectly guiltless, not only is the contract void, but the principal is liable to an action. *Per* Parke, B., *Cornforth* v. *Fowke*, 6 M. & W. 87.

(*i*) *Hern* v. *Nichols*, 1 Salk. 289; see *Taylor* v. *Green*, 8 C. & P. 316.

repurchase money, it was held that the grantor was bound to pay the same, for he appeared not to have exercised due caution in paying the money, and not to have attended to certain circumstances which ought to have put him on his guard. This principle, however, was not much dwelt upon in the judgment (*k*).

In one case it was said, that if the principal gives his agent express orders not to warrant, and the agent does warrant, the principal will be responsible. But the accuracy of this has been doubted, on account of the difficulty a purchaser from such an agent would have, from not knowing what the instructions of the principal were; and Lord Abinger observes, "in the case of a servant employed to sell a horse, but expressly forbid to warrant, is it to be contended that the buyer, induced by the warranty, to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract" (*l*).

Some further light may be thrown upon the liabilities of persons in consequence of misrepresentation *generally*, by reference to the cases mentioned below, which do not bear exactly on the point of

(*k*) *Vandaleur* v. *Blagrave*, 6 Beav. 565.
(*l*) *Cornforth* v. *Fowke*, 6 Mees. & Wels. 87; *Alexander* v. *Gibson*, 2 Camp. 550; *Helyear* v. *Hawke*, 5 Esp. 72.

the consequence to a principal of his agent's misrepresentation (*m*).

A representation to be binding upon a principal must be made by an agent who has an apparent authority to make the representation. A joint-stock company declared dividends which were false. A person applied to the law agent of the company for information, when he referred to the flourishing state of the company as shown by these dividends. This person accordingly purchased shares in the company. It was held that as the law agent of the company was not a person authorized to bind it in such matters, the representations made by him were no ground for the purchaser of the shares to repudiate these shares and relieve himself from his contract (*n*).

Again, where the agent in making a representation is guilty of a fraud which is entirely without the sanction of his principal, he may in so doing be guilty of a moral wrong, for which it would be very hard that his principal should be held responsible. This case would come within the exception hereinafter mentioned, where the liability of principals for the torts of their agents are discussed. Therefore, where the agent of a wharfinger

(*m*) *Taylor* v. *Ashton*, 11 Mees. & Wels. 401; *Ormerod* v. *Huth*, 4 Mees. & Wels. 451; *Feret* v. *Hill*, 23 L. J., C. P., 185; see *Pasley* v. *Freeman*, 2 Smith's L. Cases, 81—83.

(*n*) *Barnes* v. *Pennell*, 2 H. L. Cas. 597.

fraudulently produced a receipt for goods which he had not actually received, and by so doing induced a person to pay money to the third party, from whom it was represented that the goods had been received, the wharfinger was held not to be responsible for the fraud of his agent (*o*). This case, however, was decided on the ground of an excess of authority (*p*).

Perhaps the liability or non-liability of the principal turns upon the inquiry, whether the circumstances of the agency have induced a belief in the mind of the person contracted with, that the principal has given his agent the authority to warrant, or whether he has merely given him authority to dispose of the subject of the contract. Where it is reasonable to infer that the principal has given an apparent power to that effect, although he may have expressly forbid his warranty or representation, he ought to be answerable in an action on the case, for the reason above stated by Lord Holt. But where no such presumption exists, although, of course, the contract is liable to be rescinded at the option of the party deceived, arguing from analogy to the cases of wilful torts and negligences done by agents, it would appear that the principal should not be liable for any wilful or officious warranty or

(*o*) *Coleman* v. *Riches*, 24 L. J., C. P., 125.
(*p*) Lord Abinger, *Cornforth* v. *Fowke*, 6 M. & W. 87.

misrepresentation of the agent. If an agent makes representations concerning the subject-matter of a contract, and subsequently the principal and the other party complete the contract, but do not refer to the representations of the agent, the opposite contracting party cannot incorporate the former statements of the agent, and make them part of the contract (*q*). Cases frequently occur on contracts of insurance, in which the representations made by agents to underwriters are held to bind the principal, although the latter may be ignorant of the facts relative to which they are made. In these cases, also, much depends on the question, whether certain facts are in the knowledge of the insured; and it may be laid down as a rule without exception applicable to all contracts, that notice to the agent is notice to the principal, when it is connected with the subject-matter of his agency (*r*). So that the suppression or misrepresentation of a particular fact by an agent vitiates an insurance, although that fact may have been known only to him, and not to his principal (*s*). But the notice must be while he is concerned for his principal: therefore notice, before an agency is begun, or after it has terminated, will not ordinarily affect the principal (*t*).

(*q*) *Knight* v. *Barber*, 16 M. & W. 69.
(*r*) Story, § 140.
(*s*) *Fitzherbert* v. *Mather*, 1 T. R. 12; Smith, Merc. Law, 123.
(*t*) Story, § 140.

Sect. III.

OF CONSEQUENCES TO AGENT OF HIS OWN MISREPRESENTATION.

If an agent makes a misrepresentation or is guilty of fraudulent concealment, he will be himself liable to the party aggrieved in all cases; and this, although it may be in the knowledge of such person, that, while contracting, he was doing so under a delegated authority, and that he was only fulfilling his instructions, for no authority to do a wrong can be conferred by one person on another (*u*). We have seen that the question of his knowing it to be false is immaterial, if in point of fact it turn out to be so. If an agent by his representations induces persons he is dealing with to suppose that he has authority from his principal to enter into a particular contract, to sign a bill, or the like, when in point of fact he has no such authority, he will himself be liable for the misrepresentation (*x*), though, as we have seen above, he cannot be sued upon the contract unless he is himself the principal (*y*). And in this case the principal, or rather the supposed principal, will be discharged, unless he has put it in the agent's power

(*u*) Story, § 311. The statement, however, is cited with respect to torts and misfeazances.

(*x*) *Polhill* v. *Walter*, 3 B. & Adol. 114; *Nicholson* v. *Lewis*, 21 L. J., Q. B., 311.

(*y*) *S. C.*; *supra*, p. 144.

to make the representation plausible, for otherwise any person might enter into a contract on behalf of another from whom he had no authority, and, by using his name, bind him to fulfil it or render him liable for a breach of contract. But money paid to a principal under an inducement of this kind may be recovered (*z*).

If the principal keep his agent in ignorance of a latent defect in the subject of a sale, and the agent accordingly innocently states what is not true, the principal will be answerable for such misrepresentation. The representation of the agent in such a case is the representation of the principal, and, coupled with his knowledge of its falsehood, is a fraud (*a*). As a principal is responsible for any fraud of his agent committed by the latter of his own accord, he will, of course, be so for any fraud, which he has himself practised on third persons through the instrumentality of the agent.

(*z*) *Smith* v. *Sleap*, 12 M. & W. 588.
(*a*) *Cornforth* v. *Fowke*, 6 M. & W. 370.

CHAPTER X.

OF THE LIABILITIES OF PRINCIPAL AND AGENT FOR TORTS.

Where any tort or negligence has been committed by an agent, the principal, who has been improvident in putting it in the power of the agent to commit the wrong, or has instigated it, and the agent, who has been a wrong-doer in the performance, will generally each of them be equally liable to third persons. If an action is brought against the principal, he cannot resist it by proving that he did not instruct or authorize his agent to act in the manner complained of, if, in fact, it appeared to third persons that the agent was acting within the scope of his authority, or if the principal has given instructions to his agent to do the act. And if an action is brought against the agent, it will be no defence for him to say that he acted under the direction of the person who was ostensibly his employer. It is usually at the option of the party injured, against whom he will seek redress, and he can always do so against the agent for a positive wrong.

Wherever a wrongful act has been done by an agent, either he or his principal are answerable; and where the agent is not liable, the principal is. In the majority of instances, the maxim *respondeat superior* applies, for the principal ought to select him from a knowledge of his aptitude, and can remove him for misconduct; by his selection he holds him out as competent and fit to be trusted, and thereby, in effect, warrants his fidelity and good conduct in all matters of the agency (*a*).

Sect. 1.

OF THE LIABILITY OF THE PRINCIPAL FOR THE TORT OF AGENT.

But these general rules are liable to certain modifications; and we will therefore consider the circumstances under which a principal is liable for the torts of his agent, and some of the reasons which have been adduced for holding him so.

It is clear that it is only in transactions in which some act is to be performed that an agent can commit an act of tort or negligence which can injure *third persons;* in all matters lying in contract, the wrong-doing and injury to third persons must

(*a*) *Coggs* v. *Bernard,* 2 Ld. Raym. 909; Smith's L. Cases, p. 82; Story, § 452.

be of a fraudulent nature, as distinguished from the acts of tort or negligence we now refer to, and any negligent act done in conducting them will recoil on the principal himself, without the intervention of any other person. In the majority of cases, therefore, which arise on the injury done to third persons by the tort of the agent, the latter may be looked upon more as a servant than as one of the class of agents of whom we have been principally treating, while considering the power of the agent to bind his principal by contracts. But it does not follow that the permanent relation of master and servant should subsist between them beyond the particular act in which the agent is employed. The responsibility of the master for the acts of his servant rests upon the principle, that any man having authority over the acts of another, who either expressly commands him to do an act, or puts him in a condition, of which such act is the result, or by the absence of due care and control (either primarily in the choice of the servant, or immediately in the supervision of the act itself), suffers him to do an injury, shall be responsible for the act of the servant in the same way as if it were his own (*b*).

In some of the cases on this subject the principle, that a person shall be answerable for an injury which arises in carrying into execution that which

(*b*) *Weyland* v. *Elkins*, Holt's N. P. Rep. 229, n.

he has employed another to do, has been carried to a great length, and has been extended to the acts of *sub*-agents. Thus, a person having a house by the road side, contracted with another to repair it for a stipulated sum, that person contracted with a third to do the work, and he with a fourth to furnish the materials, the servant of the last brought a quantity of lime to the house and placed it in the road, by means of which the plaintiff's carriage was overturned; it was held that the original contractor was liable for the damage sustained (*c*). In a later case, the judges were not agreed whether the owner of a carriage, who hired of a stable keeper a pair of horses to draw it for a day, the stable keeper providing the driver, was liable for an injury done to a third person by the unskilful driving of the coachman (*d*); C. J. Abbott and J. Littledale holding the defendant, the owner of the carriage, liable, Js. Bayley and Holroyd, *contrà*. The exemption of the master or principal from liability seems to rest upon the fact of the act of the employed having no connexion with the service imposed upon him by the person sought to be charged, or of the employed being an independent agent, although his employment in the matter was caused by the person who applied to him and

(*c*) *Bush* v. *Steinman*, 1 Bos. & Pull. 409.
(*d*) *Laugher* v. *Poynter*, 5 B. & C. 547.

retained his services (*e*). In a recent case, where a person being engaged to pave a street, provided and carried stones for that purpose in his own carts to the spot, and contracted with another to lay them down, and the latter disposed them in so negligent a manner that a passer-by was injured, the Court of Common Pleas decided that the original contractor was not liable for the damage. The chief point to be regarded is whether an act done by any person is in the capacity of servant or authorized agent to the original employer, and if such relationship cannot be established, the immediate wrongdoer will be the only person chargeable (*f*). Again, Lord Denman was of opinion that there was a distinction between a person employing his own servant, and one employing another holding a separate and independent business, and presumed to be skilful therein, to perform something pertaining to his calling for him. Thus, in an action against a person who had employed a licensed drover to drive some cattle, who employed another to do the work, it was held that the principal was not, and that the drover was, answerable for the negligence of the sub-agent; and J. Coleridge said, he made no distinction between the drover and the drover's

(*e*) *Weyland* v. *Elkins*, Holt's N. P. Rep. 229, n.
(*f*) *Overton* v. *Freeman*, 18 Law Times R. 224; *Knight* v. *Fox*, 5 Exch. 35.

servant(*g*). Where a gas-fitter was employed by the defendant to do some work, for the completion of which, *inter alia*, he had entered into a contract, and in consequence of the negligence of the gas-fitter the plaintiff was injured, it was held that the defendant was answerable for anything done by the gas-fitter in the course of his employment, but not for anything done by him beyond what had been specified in the contract (*h*).

Where the wrongful act of the agent is beyond the scope of the business entrusted to him, if the principal has previously commanded the act, he will be held responsible (*i*). Thus, if a principal orders his agent to commit a trespass, or to appropriate the property of third persons, he will be himself amenable for such acts if the agent does them. If the agent, in order to effect an object which his master has in view, acts in such a manner as to injure others, the master will be liable (*k*). In a case where an action was brought against a railway company for an illegal arrest made by one who was stated to be their agent, in order to charge

(*g*) *Milligan* v. *Wedge*, 10 L. J., Q. B., 19, following *Quarman* v. *Burnett*, 6 M. & W. 499; *Rendleson* v. *Murray*, 8 Ad. & E. 109.

(*h*) *Rapson* v. *Cubitt*, Car. & M. 64.

(*i*) Story, § 458; *Croft* v. *Alison*, 4 B. & Ald. 590; *M'Manus* v. *Crickett*, 1 East, 106.

(*k*) *Croft* v. *Alison*, 4 B. & Ald. 590; *Roe* v. *Birkenhead, &c. Railway Company*, 21 L. J., Exch., 9.

the company for his act, it was held that there must be something to show an authority, either express or implied, given by the defendants, or a ratification of the act done. The plaintiff is bound to make out affirmatively that the person making the arrest was the officer of the company, or that he was authorized to arrest, either by general or particular instructions. The plaintiff in the case was nonsuited, on the ground of the want of authority; but the remarks of the learned judges in that case would certainly lead to the impression that, although the company had no right to arrest under the circumstances, if they had given instructions to their officer to that effect, they would have been liable for his wrongful act in so doing (*l*). It would appear, however, from previous cases, that there can be no implied authority from a principal to his agent to commit a positive moral wrong.

In a case which has been noticed above, the distinction between an agent holding an independent business, and one who is employed in the execution of the whole of what the principal might have done himself, or deputed his servants to perform, has been mentioned (*m*). If, therefore, goods are entrusted to some public carrier, and in his conveying

(*l*) *Roe* v. *Birkenhead, &c. Railway Company*, 21 L. J., Exch., 9.
(*m*) *Randleson* v. *Murray*, 8 Ad. & E. 109; *Quannan* v. *Bennett*, 9 M. & W. 499; *Stephens* v. *Elwall*, 4 M. & S. 259.

them he does some injury to a third person, he will be the only person liable even for his negligence; his business being of a nature complete in itself, and thereby distinguishable from that of a person not a public or common carrier who is employed by a principal.

It may be laid down as a general rule, that wherever a principal is not answerable for any damage done by any one employed by him, the agent or person employed will be the person from whom redress is to be sought. Thus, in a case above mentioned, where it happened that an injury was done through the instrumentality of a sub-contractor of the person sought to be charged, J. Maule said, "This being a case of civil injury by a sub-contractor, the rule that he is civilly and criminally responsible for his own acts must apply;" and therefore the intermediate contractor was discharged (*n*).

Sect. 2.

OF THE LIABILITY OF THE AGENT FOR HIS OWN TORT.

A principal or employer is not answerable for the wilful misfeazance of the person he employs (*o*).

(*n*) *Overton* v. *Freeman*, 18 Law Times, 224.
(*o*) *Lane* v. *Cotton*, 12 Mod. 488.

It therefore follows that the agent will himself be alone liable for his wanton wrong and mischief. Lord Kenyon, in the case of *M'Manus* v. *Crickett*, says, "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act" (*p*). The true reason of the discharge of the principal from liability for a misfeazance of his agent, is the hardship which would be entailed upon principals by the improper conduct of their agents, when such conduct depends more on some mental peculiarity than upon their professional ability and character, with which it is presumed that a principal would be acquainted. A master of a ship is not liable for a wilful act or injury done to another ship by any of his crew, although he would be for an injury caused by their negligence (*q*). So the wilful trespass of a bailiff, not arising out of the execution of his employer's orders, will not make the employer responsible for it (*r*). A carrier might be responsible if his servant negligently carried goods and drove his

(*p*) 1 East, 106.
(*q*) Story, § 456.
(*r*) *Freeman* v. *Rosher*, 18 L. J., Q. B., 342.

waggon against that of another person, but if his servant picked a quarrel by the way and damaged his adversary, the employer would be free from liability.

Sect. 3.

LIABILITY OF PUBLIC AGENTS FOR TORTS.

Public agents are *quasi* principals; but we have seen, that in many cases of contracts, they are not held responsible to third persons for the contracts of those they employ; *à fortiori*, they ought not to be held answerable for the misfeazances or nonfeazances of their deputies. Thus, the Postmaster-General is not liable for the default of any of his clerks (*s*). If the commissioners under an Act of Parliament order something to be done which is not within the scope of their authority, or are themselves guilty of negligence, they will be liable to an action; but they are not answerable for the misconduct of such as they are obliged to employ (*t*). If the doctrine of *respondeat superior* were applied to such persons, it would prove a serious discouragement to any to undertake public affairs. The case of such persons is different from that of persons acting or employing others for their own benefit (*u*).

(*s*) *Whitfield* v. *Despencer*, Cowp. 754.
(*t*) *Hall* v. *Smith*, 2 Bing. 156.
(*u*) *Per* Best, C. J., *Hall* v. *Smith*.

This principle is applied also to the case of public officers in the army or navy, who will not be accountable for what has been done by the officers under them. Thus, the captain of a man-of-war was held not to be liable for damage done to another vessel from the misconduct of his lieutenant (*x*).

But in case of any misfeazance or negligence perpetrated by themselves in the execution of their employments, agents, although they are public officers appointed by government, will be themselves liable for any damage done to a third person (*y*). Where an agent is clothed with authority as a public agent, it cannot be supposed that the government meant to justify, or even to excuse, his violation of his proper duty, under colour of that authority. Thus, where certain commissioners appointed to pave a street raised a road so much as to obstruct the passages to the plaintiff's house, and in so doing grossly exceeded their powers, they were held answerable for the damage (*z*). But it must be a clear case of misfeazance, negligence or excess of authority, or the agent will not be liable, although a third person may have sustained a damage in consequence of his acts (*a*).

(*x*) *Nicholson* v. *Mouncey*, 15 East, 384.
(*y*) *Jones* v. *Bird*, 5 B. & Ald. 837.
(*z*) *Leader* v. *Moxton*, 3 Wils. 461; Story, § 320.
(*a*) Story, § 320.

CHAPTER XI.

AUTHORITY OF AGENT TO BIND THIRD PERSONS.

Sect. 1.

OF THE LIABILITY OF THIRD PERSONS TO THE REAL PRINCIPAL.

The consideration of the authority which an agent has to bind third persons, either to himself personally or to his principal, will include the rights which agents or principals respectively acquire to enforce the obligations incurred to them by third persons.

Although a third person, in dealing with an agent, cannot, in all instances, charge a principal with the completion of any contract that may have been entered into, yet in all cases the third person is liable to the real principal. The reason of this is that a person does not always know sufficient of the relationship which exists between the principal and his agent, and may, from his ignorance, enter into a contract which does not bind the principal; whereas, to render himself liable, knowledge of the extent of authority received by the agent is immaterial; he knows the extent to which he is binding

himself, and it is of no consequence to whom he renders himself answerable, whether principal or agent, if the rights he claims against the person he believes himself to contract with can be enforced against any other person. Even if a person without any authority contract in the name of another, the person whose name is used may adopt and enforce the contract, as far as the party contracted with is concerned (*a*).

Sect. 2.

AUTHORITY TO BIND THIRD PERSONS ON WRITTEN CONTRACTS.

The person with whom a contract under seal is made, and not the person on whose behalf or for whose benefit it has been entered into, is the proper person to sue upon the same (*b*). A man may become a party to a deed and acquire a right of action thereon, as well through the *medium* of an agent as by his own immediate act. If the appointment of the agent be under seal, and he executes a deed in the name of his principal, and the covenants are entered into with the principal in express terms, the latter alone will be entitled to sue thereon. Where an action of covenant was

(*a*) *Routh* v. *Thompson*, 13 East, 274.
(*b*) Addison on Contracts, vol. ii. p. 703.

brought by a principal upon a deed expressed to be made by an agent for and on behalf of his principal of the one part, and the defendant of the other part, and the covenants were entered into with the principal, the agent's name never occurring until the end of the deed, where it appeared as executing the same, it was held that the principal, not having been a party to the deed, could not maintain an action thereon, neither could the agent, the covenants not having been entered into with him (*c*). But now, since 1st of October, 1845, an immediate estate or interest, and the benefit of any covenant or condition respecting any *lands, tenements or hereditaments*, may be taken, although the taker thereof be not named a party to the deed (*d*). If an agent contracts under seal in his own name on behalf of his principal, he is the proper person to sue upon it, although it may appear on the face of the instrument that he is contracting as agent on behalf of a disclosed principal.

Where a contract is made by writing not under seal expressly with an agent, and it imports to be a contract with him personally, although he may be known to act as agent, he may himself bring

(*c*) *Berkeley* v. *Hardy*, 5 B. & C. 355; Addison, vol. ii. p. 680.
(*d*) 8 & 9 Vict. c. 106, s. 5. It would seem that a covenant relating to *personal* property is not affected by the statute, and therefore the law relating to such covenants must remain unaltered.

an action on the contract. Thus, if goods are to be delivered to an agent or his assigns by the terms of a bill of lading, he may sue thereon; for the bill of lading amounts to a direct contract with him (*e*). If a master of a ship executes a charter-party in his own name on behalf of the owner, he may sue for the breach of any of the covenants contained therein (*f*). Where a policy of insurance is procured by an agent in his own name for the benefit of another person, the agent may sue thereon for any loss which is covered by the policy (*g*).

A principal, however, may always interfere to prevent the agent suing, unless the agent has some special property in the subject of the contract.

In all cases of written contracts not under seal, the principal may come forward and claim the benefit of the contract, notwithstanding his name does not appear as a party to it, and the agent, from the wording thereof, seems to be the only person entitled to sue (*h*). The principal, however, must establish that he was the party really contracted with. It is often a matter of difficulty,

(*e*) *Joseph* v. *Knox*, 3 Camp. 320.

(*f*) Story, § 394, citing Abbott on Shipping, part 3, chap. 1, § 2.

(*g*) *Sargent* v. *Morris*, 3 B. & Ald. 277. "In policies of insurance it is a common practice to bring your action either in the name of the agent or of the principal." Per Bayley, J., *Sargent* v. *Morris*, *supra*.

(*h*) *Sadler* v. *Leigh*, 4 Camp. 194; Lord Ellenborough, *Bickerton* v. *Burrell*, 5 M. & S. 383.

upon the face of a written instrument, to ascertain who is the party really contracted with. In the cases above referred to, in which it was said the agent might sue, it was evident that he was the direct contracting party, though on behalf of another; but the principal might nevertheless have established, by oral evidence, that although such was the case, he also had a paramount right to sue (*i*). "It is a rule of law that oral evidence shall not be allowed to vary a written contract, but the evidence which is admitted to show that another person, besides the one appearing on the face of the document, has a right to sue, will only be considered as explaining the contract; and thus there is nothing inconsistent with that rule of law in allowing evidence to be produced that one of the contracting parties was agent for another person. It is competent to show that one or both of the contracting parties were agents for other persons, and acted as such in making the contract, so as to give the benefit of the contract to the unnamed principal, and this whether the agreement be or be not expressed in writing" (*k*). Thus, where a guarantie was addressed to the attorney of a person to whom a debt was due, oral

(*i*) *Higgins* v. *Senior*, 8 M. & W. 844; *Sutherland* v. *Pratt*, 12 M. & W. 16.

(*k*) Parke, B., *Higgins* v. *Senior*, 8 M. & W. 844. See also *Humfrey* v. *Dale*, 28 Law Times, Q. B., 585.

evidence was admitted to show that the promise had not been made to him personally, but to him on behalf of his principal, who was the real creditor (*l*). For the sake of illustration, if a factor does not disclose that he is acting as agent for another, and makes a contract, whether verbal or in writing, in his own name, the principal may nevertheless claim the benefit of it, and oral evidence will be admitted to prove that the contract was really made for him, though on the face of it the factor's name alone appeared. The principal also may recover any money paid by the factor to any person agreeing to sell or to perform anything in return, the equivalent goods or service not having been given or rendered. Wherever, taking the instrument and weighing the evidence together, it is to be inferred that the promise is not made to the agent personally, but through him to the principal, the action on the contract must be brought in the name of the principal; but if the promise is made to the agent personally, though for the benefit of the principal, the agent himself will be enabled to maintain an action on the contract, subject however to the principal coming forward and asserting his paramount claims. Where an agent effected an insurance for the benefit of his principal, without his privity or consent, it was held that the

(*l*) *Bateman* v. *Philips*, 15 East, 272.

principal might subsequently ratify it, and the insurance would enure to his benefit (*m*). Where an agent entered into an agreement for the purchase of an estate in his own name, and paid a deposit to the vendor, on the vendor's default in completing the purchase, it was held that the principal could come forward and maintain an action for the recovery of the deposit in his own name (*n*). In either of these cases the agent would have been entitled to sue if the principals had not come forward to assert their rights.

An exception to the principles above stated is made in the case of bills of exchange and promissory notes, as none but the parties whose names appear thereon can sue. Thus, if a promissory note is given to an agent as such, in his own name, for the benefit of his principal, he must sue thereupon. The payee of either a bill or note must sue thereon, and in such cases he must do so as a trustee for his principal (*o*). "The case of bills of exchange are different in principle, and in them, by the law merchant, a *chose in action* is passed by indorsement, and each party who receives the bill is making a contract with parties on the face of it, and with no other party whatever" (*p*).

(*m*) *Routh* v. *Thompson*, 13 East, 274.
(*n*) *Duke of Norfolk* v. *Wortley*, 1 Camp. 337.
(*o*) *Siffkin* v. *Walker*, 2 Camp. 308.
(*p*) Per Lord Abinger, *Beckham* v. *Drake*, 9 M. & W. 92.

CHAPTER XII.

WHERE PRINCIPAL ALONE MAY SUE ON A CONTRACT.

As in the case of a third person having a claim on a principal, on account of a contract entered into by his authority or consent, if in the making of the contract the principal is disclosed, the contract is, in contemplation of law, made between the principal and the third person; and the former is the only person liable on it: so, in the case of a disclosed principal having a claim through the intervention of his agent, the principal is the only person who can enforce the contract, unless the agent has some special property or interest in the subject matter of the negotiation. Thus, a clerk or shopman employed in a shop or counting-house in making a sale, has no right whatever to sue on the contract, but the right belongs exclusively to his employer; and the same is the case if a purchase is made by them (*a*).

A factor has authority to buy or sell in his own name, but if he does disclose the principal, the

(*a*) Story, § 392.

latter alone can maintain an action on any contract so entered into, unless the factor has a lien or claim of his own, when both have their respective rights. In such a case the principal is the sole contracting party, exclusive of the agent, and is alone competent to use or enforce any remedy (*b*). In certain mercantile transactions, however, where the agent has a special property or interest in the subject matter of the contract, the agent has a right to sue, as we shall hereafter see (*c*).

But any fraud, misrepresentation or misconduct on the part of the agent will vitiate the contract, so as to subject the principal to all the consequences resulting from such wrong; and his own innocence of any share therein will not discharge him (*d*).

But it may, and in the greater number of instances does happen, that *both* principal and agent have a right to enforce a contract, or some part thereof, when entered into by the latter. We must therefore consider the manner in which their respective rights harmonize or clash, when such is the case.

(*b*) Addison on Contracts, vol. ii. p. 682.
(*c*) *Drinkwater* v. *Godwin*, Cowp. 255.
(*d*) Story, § 419.

CHAPTER XIII.

WHERE EITHER PRINCIPAL OR AGENT MAY SUE ON A CONTRACT.

SECT. 1.

AGENT'S RIGHT TO SUE SUBJECT TO PRINCIPAL'S RIGHT.

THE principal is ordinarily entitled to the like remedies against third persons on contracts made with his agents as if they were entered into with himself personally; and the fact of the agent also being entitled to sue on the contract, will not affect the rights of the principal; for the rights of the agent are generally subordinate to his (*a*). This doctrine has been long established, and it is settled that a principal may maintain an action in his own name for a promise due to his servant; as, if a debtor of the principal agree with the servant to pay him the debt, he may be sued on the promise by the principal (*b*). A master also may, in most instances, bring an action for the recovery of the

(*a*) *Sadler* v. *Leigh*, 4 Camp. 194; Story, § 420.
(*b*) *Scigniori and Wolmer's case*, Godb. 360.

servant's earnings, if it be in the knowledge of the party employing the servant that he was not acting *sui juris*, or if he afterwards had notice from the principal, before he had paid for the labour and service, that the employed was his servant (*c*).

If an agent does not disclose his principal, still the latter may at any time come forward and claim the completion and the benefit of any act which a third person is bound to the agent to perform if the principal had not asserted his claim, and this a principal may do, although, possibly, by the custom of trade the agent (for instance, a broker) is the person with whom the contract is considered as entered into (*d*). "The custom of trade is not allowed to override the principle of the common law."

With regard to contracts not put into writing, it has been held that the principal may always disclose his real character and require the fulfilment of the contract with himself personally. This may be done even in the case of factors who have sold goods for their principals in their own names under a *del credere* commission, provided, however, that the general balance of accounts between the principal and factor is at the time in favour of the

(*c*) Story, § 421. See Mr. Lloyd's note to Paley on Agency, 339.

(*d*) *Humphrey* v. *Lucas*, 2 C. & K. 152.

former (*e*). If a person has money in the hands of another, and this money is lent by the holder thereof, apparently as his own, but in fact for the true owner, such true owner may sue for the same (*f*). Where one person makes a contract on behalf of himself and another jointly, the two may maintain an action. Thus, where a person deposited money with a banker, opening a credit in his own name only, it was held that another person who was jointly interested in the money might bring an action against the banker (*g*). The principle in this case is precisely the same as that of a real principal coming forward to assert his rights, although not the ostensible contractor. But in all these cases the interest of the real principal, whether joint or sole, must be clearly shown; for if B. lend money to A., and A. make an advance to C., B. would have no right of action against C. for the amount. The proper question for a jury in a case where the undisclosed principal sues upon the contract is, whether the contract was really made by the agent for the principal, although the agent's name was used, and not whether the defendant *meant* to contract with the agent solely (*h*).

(*e*) *Scrimshire* v. *Alderton*, 2 Str. 1182; Addison, vol. ii. p. 684.

(*f*) *Sims* v. *Bond*, 5 B. & Ad. 393; *Cooke* v. *Farquhar*, 17 L. J., Exch., 288.

(*g*) *Cooke* v. *Seeley*, 17 L. J., Exch., 288.

(*h*) *Bruntou* v. *Thompson*, 7 Law Times, Q. B., 430; *Phelpe* v. *Prothero*, 24 L. J., C. P., 225.

It has recently been decided, that if an agent contracts for and on behalf of principals, whom he names in the body of the contract, but signs his own name only, he may bring an action himself for any breach of contract (*i*). Strange to say, there does not seem to have been any case exactly analogous, and it was contended that the test to ascertain whether the plaintiff had a right to sue was, whether if he had been defendant he would have been liable, and this view seems to have been acquiesced in by the Court. It is submitted that this test is not a correct one. A plaintiff, with full knowledge of the facts before him, has his choice as to whom he will make defendant, principal or agent, but a defendant has no choice who shall be the plaintiff; and if he can show that he would not have entered into the contract unless he had relied on the responsibility of the plaintiff, and the contract is executory, in the event of the agent bringing an action, he ought to have the right of resisting the agent's demand. The contract in the case cited was an executory one, and the principal was disclosed, and, although the principal was a company abroad, the rule which, for the convenience of trade, makes the home agent or factor liable, does not *per se* apply so as to give the home agent or factor a right to sue, if on other grounds the defendant is entitled to resist his claim.

(*i*) *Cooke* v. *Wilson*, 26 L. J., C. P. 15.

If an agent conceals his representative character, he may sue upon any contract he has entered into for the principal, whom he has not disclosed: inasmuch as the agent is the person with whom the contract is made, it is no answer to an action brought in his name to say, that he is merely an agent, unless it can be shown that he is prohibited by the person on whose behalf the contract was made from carrying on that action. "In such cases, you may bring your action either in the name of the person *by* whom, or of the person *for* whom, the contract was made" (*j*).

But in the above cases, if there is a real principal, he may come forward and oust his agent's right, and assert his own right to sue. "It has been settled in many cases that a principal, when disclosed, may step in and exercise his rights" (*k*).

Public agents cannot sue upon contracts entered into with them on behalf of Government (*l*).

A principal who seeks to enforce a contract entered into by an agent in his own name is subject to the same equities as the agent in relation to the person with whom the contract is made, and any right or defence which would be good against the

(*j*) *Sargent* v. *Morris*, 3 B. & A. 281, per Bayley, J.; *Hall* v. *Smith*, 2 D. & R. 587; Story, § 396.

(*k*) Per Lord Ellenborough, *Bickerton* v. *Burrell*, 5 M. & S. 384.

(*l*) *Gardiner* v. *Davis*, 2 C. & P. 49; Story, § 412.

agent, will be good against the principal (*m*). It would be hard for a person, who might have been induced by particular circumstances to deal with another, to find that he was accountable to one with whom he had no inducement for contracting, and the law accordingly allows him the same substantial rights against the real contractor which he claims against the person with whom he believed himself to be contracting. But, even in this case, the person sought to be charged will not be permitted altogether to evade the performance of his part of the agreement. Thus, if a purchase be made from a factor, *as factor*, the buyer cannot claim against the principal the right of set-off or other right which he has against the factor (*n*). The rights which a person purchasing from a broker has against the broker's principal are different from those he has against a factor's principal; as the former has not the possession or the *indicia* of property in the goods he sells, the buyer will be taken to be aware that the goods he disposes of are not his own. A broker is not authorized by the custom of trade to sell in his own name; consequently the principal will not be bound by any rights or claims the purchaser has

(*m*) 2 Smith's L. Cases, 77 ; *George* v. *Claggett*, 7 T. R. 359.

(*n*) See further, *Fish* v. *Kimpton*, 18 L. J., C. P., 206. But it seems he can if he believes him to be the principal. See *Baring* v. *Corrie*, 2 B. & Ald. 137.

against him; but, a factor having the goods in his custody, and being authorized to sell in his own name, it is right that the rule above stated should apply, and that the principal should be bound by any rights claimed against the factor, if it can be shown that the fact of his agency is not known (*o*).

Several cases have within the last few years come before the Courts, in which the right of agents to sue upon written contracts, in a character apparently at variance with the wording of the contract, has been a subject of dispute.

Most of the decisions appear to be grounded upon the principle, that the convenience of trade is to be consulted, and with this principle is coupled the consideration that as a party to any contract must be liable to *some one*, he cannot in general be materially prejudiced by being held accountable to a person whom he believed to be an agent, and with whom he entered into a contract as agent, if such person seeks to enforce that contract against him, notwithstanding there may be a variance between the character which the agent assumes in bringing the action, and that in which he appears on the face of the contract. But it is clear that a person *might* be prejudiced by being thus held liable. It therefore becomes important to consider with what object a person enters into a contract,

(*o*) *Baring* v. *Corrie*, 2 B. & Ald. 137.

and whether that object would be frustrated by his being held responsible to a different person from the one with whom he believed himself to be contracting.

Now, it is clear in *executed* contracts, those in which all has been done on one side that was required to be done, that to the person whose part remains unperformed, it is immaterial who it is that has performed the other part of the contract. Nothing in such a case remains but for him to fulfil his own part. In *executory* contracts, those in which nothing has been done on either side, there must always be a degree of doubt as to the ability of either party to perform his part of the contract, dependent upon the circumstances of each particular case. In connection, therefore, with the rights of agents to sue, contracts may be divided into two classes, *executed* and *executory*, and it may be adopted as a general rule, that a person who has represented himself to be an agent may assume the character of principal, and enforce the remainder of the contract, if he himself has done all that was agreed to be done by the supposed principal; and has thus, as far as he is concerned, rendered the contract an executed one.

But in executory contracts there are two classes. First, that in which it is certain that a person can, by doing a particular act, render it an executed

one on his side; as by payment of a certain sum of money, supplying specific goods. Secondly, that in which an inquiry must be made, in order to ascertain whether what has been done or is *offered to be done* is a sufficient fulfilment of the contract, so as to render it an executed one.

In the first of these two classes, where it is clear that a party can immediately fulfil his part of the contract, it would appear, *on his offering to do so*, that the other party ought not to be allowed to repudiate his part, merely on the ground that the person seeking to enforce the contract assumes a different character from that in which he originally appeared. In this class of contracts there cannot be any question as to the object which the person sought to be charged had in contracting.

In the second class of executory contracts, where it is not certain that one part of the contract can be fulfilled by the person who assumes a different character from that in which he contracted, it would be unreasonable that one contracting party should be required to wait to see whether the other will perform his part or not. In such a case, therefore, he should be allowed to repudiate his part of the contract. In this class of executory contracts, the principal question, one more of fact than of law, would appear to be as to the object in contracting of the person sought to be

charged; and whether that object would have been attained if the agent who seeks to enforce the contract as principal had, at the time of entering into the contract, instead of subsequently thereto, assumed the character of principal. We will suppose the case of a commercial traveller calling upon a tradesman and representing himself as the agent of some particular house, and offering to supply him with certain goods manufactured by that house. The traveller then procures some goods to be sent, not from the house he has named, but of his own manufacture, and we will assume equal in quality. The question arises, can he sue for the price of the goods as principal? He has doubtless been guilty of a certain amount of fraud, but will this prevent his recovering? To determine this, it will be essential to ascertain the object of the tradesman in purchasing. If it appeared that the name of the house supplying the goods was a material ingredient in the contract; as for instance, the purchaser wished to be enabled to warrant the goods as coming from them, it is clear that the vendor could not as principal recover for breach of contract if the purchase was not completed. If, on the other hand, it should appear that the name of the maker was not an essential object in the contract, but merely mentioned by the vendor incidentally, and that the quality of the goods sold was

the chief inducement for the purchaser to enter into the contract, it would appear reasonable that the purchaser should not be permitted, on the vendor assuming the character of principal, to repudiate the performance of the contract. The object in contracting, therefore, should in this second class of executory contracts be left to the consideration of the jury.

We may now proceed to notice some of the cases which bear upon the points referred to above. In *Bickerton* v. *Burrell* (*p*), the plaintiff made a purchase, paid a deposit, and agreed to comply with the conditions of sale as agent for another, a Mrs. Richardson. He afterwards brought an action, as being himself the principal. On the trial of the cause, it was proposed, on behalf of the plaintiff, to call the supposed principal, Richardson, to prove that she had no interest in the transaction, but Lord Ellenborough thought that the evidence was not admissible, saying, "It is wholly without precedent, and, as it seems to me, contrary to justice that a person who has exhibited himself as agent for another, should at once throw off that character and put himself forward as a principal, without any communication or notice to the other party. It was therefore decided that the plaintiff could not recover. The case was decided on the ground of

(*p*) 5 Man. & Selw. 383.

want of notice, but it has since been considerably doubted whether, if the person sought to be charged would in no way be prejudiced by being held liable, the position of Lord Ellenborough is tenable (*q*). This case is one of the second class of executory contracts, in which it is submitted the plaintiff should have been entitled to recover, as it was clear that he could at once fulfil his part of the agreement.

In *Rayner* v. *Grote* (*r*) the plaintiff described himself in a written contract for the sale of goods as the agent of other persons whom he named. The purchaser paid for part of the goods, having, at the time, notice that the plaintiff was not an agent, but the principal. On the non-acceptance of and refusal to pay for the rest of the goods, it was held that the plaintiff might sue upon the contract in his own name. In this case, the fact of the defendant having notice at the time of paying for the first portion of the goods, and previous to the action being brought, was one ground of the plaintiff's right to recover, and was a feature in the case which did not appear in *Bickerton* v. *Burrell*. B. Alderson, in delivering judgment, said, "It may be doubted whether *Bickerton* v. *Burrell* was well decided on the distinction; as it may be fairly urged that it would have been quite sufficient to

(*q*) See next case, *Rayner* v. *Grote*.
(*r*) 15 M. & W. 359; 16 L. J., Exch., 79.

prevent any possible inconvenience or injustice, and more in accordance with former authorities, if the Court had held that a party, named as an agent under such circumstances as existed in that case, was entitled, on showing himself to be the real principal, to maintain the action, the defendant being, however, allowed to make any defence by which he could show himself to be entitled, either as against the plaintiff, or as against the person named as principal by the plaintiff in the contract." With regard to the distinction which was first raised in *Rayner* v. *Grote* between executed and executory contracts, B. Alderson said, "If, indeed the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt, in many cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract; it is clear that the agent cannot then show himself to be the real principal, and sue in his own name, and it may fairly be urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule. But if the contract has been in part performed, and the part performed has been accepted by the other party with full

knowledge of the facts, he will be liable to fulfil the remainder of his part of the contract." This case is also one of the second class of executory contracts above mentioned. The practical question which should be decided is, whether, by allowing the plaintiff in such a case to introduce evidence to enable him to sue on the contract on his own account, the defendant will or will not be prejudiced.

In *Humble* v. *Hunter* (*s*) we have a case in which a person entered into an agreement for the chartering of a vessel in his own name, and described himself "as owner of the vessel Mary Ann." On the trial of the cause, which was an action brought upon the charter-party by the mother of the person above mentioned, it was proposed on her part to adduce in evidence that her son had no interest in the vessel, but had entered into the contract on behalf of his mother. The evidence was admitted, and, upon a motion for a new trial on the ground that it was wrongly admitted, a new trial was granted. It has, however, been intimated (*t*), that it was merely on the wording of the contract "as owner of the vessel," and that, had it not been for these words, the plaintiff might have sustained her action on showing that she was the real owner. This case establishes no more than that a principal may come forward and

(*s*) 12 Q. B. 310; 17 L. J. 350.
(*t*) 20 L. J., Q. B., 228.

sue as principal, although not named, and that an agent cannot disclaim a character which he has assumed in the contract, for the purpose of enabling another to sue.

In *Schmalz* v. *Avery* (*u*), the plaintiff had entered into a charter-party, expressed to be made between the defendant of the one part, and the plaintiff, as agent of the freighter, of the other part. No particular principal was named in the charter-party; and, on the trial of the cause, it appeared that the plaintiff was himself the principal, and not merely an agent. He was held entitled to sue upon the charter-party. As no principal was here named in the contract, it was clear that the defendant could not have relied on the responsibility of the principal, and he could only be prejudiced by being made answerable to the plaintiff on the assumption that he would have entered into the contract with any one else in the world but the plaintiff. "The charter-party would be contradicted, no doubt, by the agent coming forward and saying that he was the principal; but the defendant would not be prejudiced, as he appeared regardless who the real principal was. The plaintiff might also be considered as filling two characters, viz., those of principal and agent. A man cannot, in strict propriety of speech, be said to be agent to himself, yet,

(*u*) 20 L. J., Q. B., 228.

in contracts of this description, we see no absurdity in saying that he might fill both characters, that he might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt the character of freighter himself, if he chose." The contract, in this case, would appear to be an executory one of the second class; and, as there might be some uncertainty as to the ability of the agent to perform his part of the contract, if any principal had been named, the agent would not have been entitled to maintain the action, but, under the peculiar circumstances that no one was specified as the principal, the agent was held entitled to sue in that character (*x*).

Sect. 2.

WHERE AGENTS ALONE MAY SUE ON CONTRACTS.

We have seen that an agent cannot in general enforce a contract, if, on making it, he has declared that he acts as the representative of a principal whom he names, unless he has himself some interest in the subject-matter thereof. There is no case in which a person who is a *bonâ fide* agent has an exclusive right to sue on a contract, unless the contract is by an instrument under seal, or by some negotiable instrument, as a bill of exchange,

(*x*) See also *Cook* v. *Wilson*, 26 L. J., C. P., 15.

which he has executed in his own name. But there are certain circumstances under which agents may enforce contracts entered into by them, although their representative character has been declared. If an agent has a special property or interest in the subject-matter of the contract, he can maintain an action thereon in his own name, whether he professed to contract for himself or for another. For instance, an auctioneer may sue in his own name for the price of goods sold by him at a public auction, even though the principal was publicly known (*y*). A factor may sue a purchaser of his principal's goods, where he has a claim on the goods for his commission (*z*). Whenever an agent is accountable to his employer for the price of goods entrusted to him for sale, it may be laid down as a general rule that he is entitled to sue in his own name for the price of them. Thus, an agent selling under a *del credere* commission will, under any circumstances, be empowered to sue for the price of goods sold by him for his principal (*a*). From the general usage of trade masters of ships have a right to sue on all contracts entered into by them on behalf of their employers. If an agent has made a payment which ought not to have been made, and, at the same time discloses his principal, as he

(*y*) *Williams* v. *Millington*, 1 H. Bl. 81.
(*z*) *Houghton* v. *Matthews*, 3 Bos. & Pull. 485.
(*a*) *Ibid.*

will be answerable to his principal for the amount, he has a right to sue the party receiving payment for the amount (*b*). As a master of a ship is liable to a third person for any contracts entered into by him, although the name of the principal is disclosed, the obligation of the third party to him is reciprocal, and he may accordingly sue on any contract he enters into, although his principal is known (*c*). Where the master of a ship would be answerable to his employer for the freight, if he delivers the goods specified in a bill of lading without receiving payment, he may maintain an action on the bill of lading against the consignee who has accepted the goods (*d*). We have seen above that masters of ships incur large liabilities, it is only just that they should possess reciprocal rights. If a policy broker effects an insurance in his own name, but at the same time declares for whose use and benefit he does so, he is entitled to sue upon the policy, as, by the usage of trade, he has a lien for his commission (*e*). It is said by Mr. Justice Story, that factors acting for a prin-

(*b*) Story, § 398; *Stevenson* v. *Mortimer*, Cowp. 386. "The agent in such a case may recover from the authority of the principal, the principal may, as proving it to have been paid by the agent."—Lord Mansfield.

(*c*) See *Coppin* v. *Craig*, 7 Taunt. 243.

(*d*) *Brouncker* v. *Scott*, 4 Taunt. 4; *Sanders* v. *Vanzeller*, 4 Q. B. 295.

(*e*) Addison on Contracts, vol. ii. p. 706; *Wolff* v. *Horncastle*, 1 B. & P. 316; *Whitehead* v. *Vaughan*, Cooke's Bank. Law, 576.

cipal residing in a foreign country, as they are the only persons liable on contracts, are the only persons entitled to enforce them (*f*). As to domestic factors, in every contract entered into by them, whether they are acting under a *del credere* commission or not, they are entitled to sue as principals, and as the goods are entrusted to their custody, they have a special ownership in them, and a lien thereon (*g*). The reason of this is, that they are personally liable to their employers, or to third persons, for the amount, besides having the right to possession and the special ownership in any goods bought or sold (*h*). An agent, for instance a factor, may maintain an action for his own benefit, if he has a lien on any goods which have been sold by him, and he may recover the price of the goods to the extent of the balance due to him (*i*). He may also recover the amount of his commission from a purchaser in the same way. The contract is in such a case the contract of the factor, although the principal has been named; and, if the buyer, after notice from the factor of his claim on the price of the goods, should settle with the principal, it has been thought that payment to the principal would not be a defence to such an action, though without

(*f*) Story, § 400; *Gonzale* v. *Sladen*, Selw. Nisi Prius, 814, n.
(*g*) *Sadler* v. *Leigh*, 4 Camp. 194; Story, § 401.
(*h*) Story, § 401.
(*i*) *Drinkwater* v. *Goodwin*, Cowp. 256.

such notice it would (*k*). And, in a case of this kind, the buyer will not be permitted to set off a debt due to him from the principal (*l*); unless he has bought with reference to that set-off, and was induced to purchase in consequence of the introduction of the principal's name (*m*). It does not seem by any of the cases that the rule, which makes the home agent or factor of a foreign principal liable, extends to the converse case, and gives him a right to sue unless he has a special interest (*n*).

An agent cannot contract as agent for a principal whom he names, and then bring an action as principal; at any rate, he must give notice of his real character to the other party before bringing his action (*o*). But if it be in the knowledge of the party he is dealing with, that, although professing to act in the name of another, he is really the principal, the necessity of notice is done away with, and he may maintain the action himself (*p*). If an agent contract in his representative character, without naming any principal, he may afterwards sue as principal, if in point of fact he is so (*q*). It

(*k*) *Coppin* v. *Walker*, 7 Taunt. 237.
(*l*) *Atkyns* v. *Amber*, 2 Esp. 493.
(*m*) *Coppin* v. *Craig*, 7 Taunt. 243; *Coppin* v. *Walker*, 7 Taunt. 237; Story, § 404.
(*n*) But see *Cooke* v. *Wilson*, 26 L. J., C. P., 15.
(*o*) *Vide supra*, p. 218; *Bickerton* v. *Burrell*, 5 M. & Sel. 383.
(*p*) *Rayner* v. *Grote*, 15 M. & W. 359; 16 L. J., Exch., 79; *Humble* v. *Hunter*, 12 Q. B. 310; 17 L. J., Q. B., 350.
(*q*) *Schmalz* v. *Avery*, 20 L. J., Q. B., 228.

will be no defence to an action brought by an agent, that the principal repudiated his contract after it was entered into (*r*).

Sect. 3.

MODIFICATIONS OF AGENT'S RIGHTS.

The rights of agents are subject to be modified by the control of their principals. If the principal has a right to sue on a contract as well as the agent, he may generally supersede him, and proceed in his own name (*s*); or he may suspend or extinguish the right of the agent by making arrangements or waiving claims with the opposite party to the contract (*t*).

We have seen that a third person may set up the same rights against an undisclosed principal that he has against the agent with whom he supposes himself to be contracting. A similar rule prevails in the converse case, and a third person may set up the same defence against an agent, who discloses his principal, that he could against the principal himself. Thus, if an auctioneer sells goods for his principal, and the buyer pays the price thereof to the principal, without any notice from

(*r*) *Short* v. *Spackman*, 2 B. & Ad. 962.
(*s*) *Sadler* v. *Leigh*, 4 Camp. 194; *Gardiner* v. *Davis*, 2 C. & P. 49.
(*t*) *Coppin* v. *Walker*, 7 Taunt. 237.

the auctioneer of any of his claims, the payment will be a good defence to an action brought by the auctioneer (*u*). A third person may, in like manner, claim a set-off against the agent (*v*).

The same rule applies in other matters of defence; and fraud, misrepresentation, want of consideration, or the like, may be set up as a defence against an agent known to be acting as such, in the same manner that they could against the disclosed principal (*x*).

The power of the principal to supersede the right of his agent, and of third persons to set up the defences against him, which they have against the principal, is, however, dependent upon the question, whether the agent has acquired any *lien* or other claim on the subject of the agency, either against the principal or the third person (*y*). If an agent has a right of this description, he may assert it in opposition to the assignees of his principal in case of the principal's bankruptcy (*z*). If a person, against whom the agent has such claim, should, after notice thereof, pay money to the principal, on an action being brought by the agent to recover the amount, he will be answerable for

(*u*) Story, § 404; *Coppin* v. *Walker*, 7 Taunt. 237.
(*v*) *Coppin* v. *Walker*, 7 Taunt. 237.
(*x*) *Solomons* v. *Bank of England*, 13 East, 135, n.; *De la Chaumette* v. *Bank of England*, 9 B. & C. 208; Story, § 404.
(*y*) *Drinkwater* v. *Goodwin*, Cowp. 251; Story, § 407.
(*z*) *Hudson* v. *Grainger*, 5 B. & Ald. 272.

the same, and the payment to the principal will be no defence to the action (*a*). The principal, however, may satisfy the claim of his agent; his right on the contract will then be freed from the incumbrance, and a payment of part of the amount of any demand of the agent will operate as an extinguishment *pro tanto* (*b*).

Mr. Justice Story seems to be of opinion, that an agent selling or purchasing in his own name may avail himself of any set-off he has either against the purchaser or seller (*c*). However, it does not seem that any case supports the proposition as to the purchaser (*d*).

(*a*) *Drinkwater* v. *Goodwin*, Cowp. 256.
(*b*) Story, § 410.
(*c*) Story, § 411.
(*d*) As to seller, see *Morris* v. *Cleasby*, 1 M. & Sel. 576.

CHAPTER XIV.

OF PAYMENTS BY AGENTS.

We have seen above some of the instances in which payments to or by agents are binding on their principals, we must now pass in review those in which they effectually discharge them, and are binding on third persons, also those in which the principal has a right as against them to recover back the amount paid. A payment in cash will of course discharge both principal and agent. But payment by an agent in any other way is so far binding on a third person, that, if it is rightfully made and he accepts it as a discharge of a debt, the principal is thereby released (*a*). Thus if a factor, employed to purchase goods for his principal, should give his own promissory note for the amount of the price of the goods, and the vendor *should accept it as payment*, the principal will be discharged, and the vendor will have no remedy except against the agent (*b*). The question, in cases of this kind, is ordinarily one of fact, whether

(*a*) *Seymour* v. *Pychlau*, 1 B. & Ald. 14; *Strong* v. *Hart*, 6 B. & C. 160.

(*b*) *Strong* v. *Hart*, 6 B. & C. 160.

the note is received as a conditional or an absolute payment. If, as between the parties, the payment is meant merely as conditional in case the principal does not pay himself, but nevertheless the agent gets an absolute receipt whereby the principal is induced to consider the matter settled, the debt, as to the principal, will be considered as discharged (*c*). But if the principal knows the payment by note to be conditional on his not paying himself, and does not deal differently with his agent in consequence of the absolute receipt, he is not discharged (*d*).

As to the cases where the principal has a right to recover back the amount paid by his agent, a third person will be answerable for a sum received by him of an agent, if the payment ought not to have been made, and the principal would have had a right, if he himself had paid the amount, to recover it. The circumstances under which a principal is entitled to recover back payments made by the agent are various. Among others, a failure of consideration will give him the right to do so. Thus, if an agent insures and pays a premium on a policy, which never attaches, the principal may recover the amount from the underwriter who received

(*c*) *Wyatt* v. *Marquis of Hertford*, 3 East, 147; Story, §§ 431, 433.

(*d*) *Wyatt* v. *Marquis of Hertford*, 3 East, 147.

it (*e*). If an agent pays money under a mistake of fact, if money has been illegally extorted from him, or he has been induced to make a payment by fraud or imposition being practised upon him, the principal may recover it back (*f*). If the agent has himself been a participator in the fraud with the party receiving payment, the principal may recover the money back from the receiver of the payment (*g*).

It has been seen above, that payments made to an agent are generally good, if he has authority to receive payment, but that a principal may intercept a payment to his agent, by giving notice to a third person not to make such payment; and in such a case, if a payment is made contrary to the notice, he will have a right to receive payment from the debtor (*h*). In the same manner, payments made by an agent in a wrongful manner, or after notice that the agent has no right to make the payment, may be recovered from the person by whom the money is received.

(*e*) *Johnston* v. *Usborne*, 11 Ad. & E. 549; *Bonzi* v. *Stewart*, 6 Sc. N. R. 1.

(*f*) *Stevenson* v. *Mortimer*, Cowp. 805; *Duke of Norfolk* v. *Worthy*, 1 Camp. 387.

(*g*) *Taylor* v. *Plumer*, 3 M. & Sel. 562; *Gibson* v. *Winter*, 5 B. & Ald. 101.

(*h*) *Favenc* v. *Bennett*, 11 East, 36; *Mann* v. *Forrester*, 4 Camp. 60; Story, § 429.

CHAPTER XV.

WHERE PRINCIPAL AND AGENT MAY SUE FOR TORTS OF THIRD PERSONS.

SECT. I.

WHERE PRINCIPAL MAY SUE.

IF an agent joins with a third person in committing a wrong, to the detriment of his principal, both will be liable, jointly as well as severally, to the principal (*a*). Thus, if an agent tortiously converts the property of his principal, as, for instance, if he sells to a third person, without having authority to do so, such third person and the agent will both be liable for the wrongful conversion (*b*); and the third person will be equally liable, if it has proceeded from his want of due caution, that the agent has been enabled to do the wrong, as, if he had of his own free will consciously coincided in the act (*c*).

(*a*) *Taylor* v. *Plumer*, 3 M. & Sel. 562.
(*b*) *Clarke* v. *Shee*, Cowp. 197; Story, § 437.
(*c*) *Taylor* v. *Plumer*, 3 M. & S. 562, 576; *Pickering* v. *Busk*, 15 East, 38.

If it be only the third person who has committed the *tort*, he will be liable to whichever party he has injured, whether it be principal or agent (*d*). Thus, if a third person should wrongfully convert or misuse property of the principal in the possession of his agent, or, on the sale of goods to the agent, should be guilty of gross fraud, the principal may maintain an action for any loss caused by the wrongful act of the third person (*e*).

If it should be more to the advantage of the principal to avail himself of the wrongful act, and his so doing would be in effect to affirm the contract, he may do so if he chooses. Thus, in the case of a fraudulent purchase, he may waive the tort and bring an action for the amount due, or on a tortious sale of goods he may sue for a breach of contract, or bring an action of trover (*f*).

Sect. 2.

WHERE AGENT MAY SUE.

Agents have a right to maintain an action for any damages sustained by them through any wrongful acts done by third persons in the course

(*d*) Story, § 437.
(*e*) Story, § 438.
(*f*) *Hunter* v. *Princeps*, 10 East, 378; Story, § 439.

of their agency. Thus, factors may maintain trespass or trover against third persons for any injury done to the property entrusted to them while in their possession (*g*). So, if by the misrepresentation of any one, an agent makes a contract which his principal repudiates, and the agent is consequently damnified, he may maintain an action for compensation for the injury. But any loss sustained by agents must be in immediate connection with the subject of their agency, or where they have a right to possession which is infringed, or where they incur a personal responsibility or damage in consequence of the tort, in order to enable them to maintain an action for damages (*h*). If the loss be inconsequential, or in a matter in which they have no interest, they cannot maintain such an action.

(*g*) *Williams* v. *Millington*, 1 H. Bl. 81; *Joseph* v. *Knox*, 3 Camp. 320; Smith, Merc. Law, p. 139.
(*h*) Story, §§ 415, 416.

CHAPTER XVI.

OF THE DETERMINATION OF THE AGENCY.

SECT. 1.

PRINCIPAL MAY REVOKE AUTHORITY.

THE revocation of an agent's authority may be either by the act of the parties, by operation of law, through the completion of the commission, or by lapse of time.

An employer may in general, at any time, dispense with the services of the employed (*a*), unless he has agreed with him for a certain period of service; in which case he cannot discharge him until the time agreed upon has elapsed (*b*). But the word "permanent" does not constitute a durable appointment, but the intention of the agreement is to be considered, and if it appears that an engagement of a certain duration was intended, damages for a dismissal previous to its expiration may be recovered (*c*). The right of revocation of an agent's

(*a*) *Raleigh* v. *Atkinson*, 6 M. & W. 670; *Fletcher* v. *Marshall*, 15 M. & W. 755.
(*b*) *Elderton* v. *Emmens*, in error, 17 L. J., C. P., 307.
(*c*) *Ibid.*

authority is subject to the limitation that the agent has not done anything in the meantime to render himself personally liable to a third person in consequence of the instructions of his principal (*d*); but a countermand previous to any such act is effectual.

If the authority of the agent is coupled with an interest, or is given for a valuable consideration, it cannot be either determined or revoked in a summary way until the interest is disunited from it. Thus, if a principal gives a power of attorney to a creditor to collect and receive all his debts and claims for the benefit of his creditors, the power is irrevocable (*e*). A power given to a creditor to sell lands of his principal for payment of his debts is also irrevocable (*f*). If the authority has been in part executed by the agent, it cannot be revoked unless the part executed can be separated from the part unexecuted; for the law will not permit the agent to suffer from his having partly executed his instructions, and having thereby rendered himself liable to the other contracting party, and not being allowed to complete them (*g*). The rights of the other contracting party, moreover, will not be

(*d*) *Fletcher* v. *Marshall*, 15 M. & W. 755.
(*e*) *Walsh* v. *Whitcomb*, 2 Esp. 565.
(*f*) *Gaussen* v. *Morton*, 10 B. & C. 731.
(*g*) *Hodgson* v. *Anderson*, 3 B. & C. 842; *M'Ewen* v. *Woods*, 17 L. J., Q. B., 207.

affected by such a revocation, but he will retain them as if it had not taken place.

The revocation of the agent's authority is, in most cases, the revocation of the authority and appointment of any substitutes under him (*h*). But necessity may justify the continuance of that substitute; as, if a master of a ship were removed, or his appointment determined in any way, it would be presumed that the mate might act as master until a new one was appointed, for it is, ordinarily, his duty to act as master when the place of the latter is vacant (*i*).

Sect. 2.

TIME AT WHICH REVOCATION TAKES EFFECT.

The time at which a revocation takes effect is from the moment at which it is made known either to the agent, or to the third person (*k*). Where it is in the power of the principal to revoke the authority, the communication of his intention to the agent *ipso facto* has that effect. A principal, revoking his agent's authority, should give notice of his having done so; for any one, who deals with

(*h*) Story, § 469. (*i*) Story, § 469. (*k*) Story, § 470.

an agent in ignorance of the determination of his authority, will not be permitted to be a loser by the principal neglecting to give notice, if the agent appears to possess an authority, which in fact has been determined (*l*. Therefore, the acts of an agent, until such public revocation of his authority, bind his principal. And where the plaintiffs in an action had purchased goods of some broker, whose authority had been revoked, but no notice thereof had been given to the plaintiffs, they were held entitled to recover from the principal for breach of contract (*m*). Where one of two innocent persons must suffer, the one, through whose confidence or silence the other has been misled, must sustain the loss. If an offer or an appointment has been made, it is deemed a continuing offer or appointment up to the time when the other party assents thereto. So that if a person writes by post, making an appointment of an agent, but before the letter is received by the person, to whom it is addressed, he revokes his offer, the revocation has no effect, until such time as the person has received the revocation (*n*).

If the authority which is given to an agent is only a particular authority, third persons in dealing

(*l*) *Hazard* v. *Treadwell*, Str. 506; *Ryan* v. *Sams*, 11 Law Times, Q. B., 221.

(*m*) See *Odams* v. *Avery*, 17 Law Times R. 63.

(*n*) *Adams* v. *Lindsell*, 1 B. & Ald. 681.

with him should use due caution, and ascertain by inquiry, whether it exists or has been revoked (*o*). An agent acting under a general authority will be liable for acts done, after the determination of his authority by the bankruptcy of his principal, but were he a particular agent, he will not be so (*p*).

Sect. 3.

MANNER OF REVOCATION OF AUTHORITY.

A revocation may take place either by a formal or informal instrument; or by a declaration of any kind showing the intent; or may be implied from circumstances; as for instance, the appointment of a second agent to execute the whole of the same commission. The performing by the principal himself of the duty which was entrusted to the agent will have the same effect (*q*).

If the appointment of an agent is by a formal instrument, however, it can be revoked only by a similar instrument (*r*).

(*o*) *Salte* v. *Field*, 5 T. R. 215; *Acey* v. *Fernie*, 7 M. & W. 156.
(*p*) *Pearson* v. *Graham*, 6 Ad. & Ell. 900; Smith, Merc. Law, p. 132.
(*q*) Story, § 474.
(*r*) *Dickenson* v. *Lilwall*, 4 Camp. 277; *Sykes* v. *Giles*, 5 M. & W. 645.

Sect. 4.

BY RENUNCIATION OF AGENT.

An agent may renounce the performance of the duty entrusted to him at any time before he has actually commenced it, provided there is no contract between himself and his employer that he should perform the duty for valuable consideration. But if no remuneration is to be paid him for his services, he may at any time before commencing the business refuse to enter upon it. If, however, in the latter case, he once sets about the work, he cannot refuse to complete it, so as to prejudice his principal; and if he did so refuse, and the principal sustained damage, he would be held liable to make good the same. But it is probable that the principal could not sue him for breach of contract; for *ex nudo pacto non oritur actio* (*s*).

Sect. 5.

DISSOLUTION BY OPERATION OF LAW.

The determination of the agency may take place, not only by the acts of the parties, but also by operation of law. Thus the marriage of a *feme sole* will have the effect of revoking the authority

(*s*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909; *ante*, p. 24.

given to an agent appointed by her *dum sola* (*t*). And it would seem that the marriage of a *feme sole*, who has been appointed agent before her marriage, will not operate as a revocation of her agency; for, as she may be an agent after her marriage (*u*), she may continue to perform any duty confided to her until the authority to do so is revoked.

The death of the principal will revoke the agency. The act must be done in the name of the principal; "and how," says Lord Ellenborough, "can a valid act be done in the name of a dead man" (*w*). It is stated by Justice Story, that an exception to the rule is to be found where the agent has an interest vested in the thing relating to which the power is given (*x*). This appears to mean no more than that a person who has anything placed at his disposal can do anything with it, although the person from whom he got it may be dead. An American case is cited, but the judgment does not tend to show that in a case of *simple agency*, even if the agent has an authority coupled with an interest, he can do a valid act after the death of his principal (*y*).

The death of the agent will equally have the

(*t*) Story, § 481; *Anon.*, 1 Salk. 117, 309.
(*u*) *Supra*, p. 6.
(*w*) *Watson* v. *King*, 4 Camp. 272.
(*x*) Story, § 489.
(*y*) *Hunt* v. *Rousmaniere*, Story, § 488.

effect of putting an end to the agency, and the authority will not devolve either on his successors in business, or on the agent's personal representatives (*z*).

Whether the insanity of the principal operates as a revocation of the agency or not seems doubtful, and no case directly bearing on the point appears to have occurred in the English Courts. It would seem that until a person is found lunatic by inquisition, the acts of persons appointed as his agents whilst in possession of his faculties are binding; but after he is found lunatic by inquisition, the power of an agent so appointed is revoked. It would certainly appear reasonable that, until some personal representative (so to speak) of the insane and *mentally* dead person is appointed, the authority of agents appointed by him whilst sane should be held to subsist (*a*).

The insanity of the agent will of course operate as a revocation of his authority (*b*).

The bankruptcy of the principal will have the effect of determining the authority of an agent appointed by him, so far at least as regards the management or disposal of the bankrupt's property in which his creditors have an interest (*c*). So far

(*z*) Story, § 490.
(*a*) Story, § 481, note.
(*b*) Story, § 487.
(*c*) *Parker* v. *Swett*, 16 East, 382.

as relates to matters with which the creditors have no concern, the authority of the agent is not revoked by bankruptcy (*d*). Of course, whenever an agent can sell in defiance of his principal's instructions, on account of any interest he may have, as for instance for a lien on goods consigned to him as factor, his authority is in no way prejudiced by his principal's bankruptcy (*e*). The term, "authority coupled with an interest," has been applied to cases of this description, but it would be much more correct to consider the interest of the agent as quite independent of the authority. It is indeed an interest which he may proceed to realize in defiance of his authority and instructions.

It appears that the bankruptcy of the agent will operate as a revocation of the authority given to him. It ought, surely, however, to depend upon the nature of the business. If it is a matter connected with the trade in respect of which the agent is declared a bankrupt, the authority should be considered as revoked; but, if it be independent of such trade, there seems no good reason for considering the bankruptcy a determination of the agency (*f*).

The extinction of the subject-matter of the agency will, it need hardly be said, put an end to

(*d*) *Dixon* v. *Ewart*, 3 Meriv. 322.
(*e*) *Alley* v. *Hotson*, 4 Camp. 325.
(*f*) *Hudson* v. *Granger*, 5 B. & Ald. 27.

the agency. Thus a master of a ship is *functus officio* on the ship he commands being lost, and a factor's duties are at an end on the destruction of the articles committed to him for sale.

The expiration of the time during which the agency was to last will operate as a determination of it. Thus, if a person appoints another to be his agent for a year, or during his absence, at the end of the year, or on his return home, the agency will be determined (*g*). But in both of these cases, and indeed in all cases where it is possible that third parties may not be fully acquainted with the true state of the facts, notice of the agency having terminated should be given by the principal (*h*).

It would appear, that where any duty has been committed to another, and, from any cause whatever, the same has been revoked, if anything has been done in pursuance thereof, and the agency is of a description that it can be executed in the name of the agent, and not of the principal, the revocation will not take effect; but the agent may proceed to a fulfilment of his duty. And the heirs and representatives, in case of the death of the principal, are bound to ratify what has been done (*i*).

(*g*) Story, § 480; *Blackburne* v. *Scholes*, 2 Camp. 341.
(*h*) *Salte* v. *Field*, 6 T. R. 215.
(*i*) See Story, §§ 492—498, in which section the learned author seems to say that there are no cases directly bearing on the point, but that the conveniences of trade require this doctrine to be held.

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